

EDITOR'S NOTE

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86-421-ASX  
Status: GRANTED

Title: Board of Directors of Rotary International, et al.,  
Appellants  
v.  
Rotary Club of Duarte, et al.

ocketed:

September 15, 1986 Court: Court of Appeal of California,  
Second Appellate District

Counsel for appellant: Sutter, William Paul

Counsel for appellee: Okrand, Fred, Resnik, Judith

Entry	Date	Note	Proceedings and Orders
1	Sep 15 1986	G	Statement as to jurisdiction filed.
2	Sep 15 1986		Appendix of appellant Bd. of Dir. of Rotary Intl. filed.
3	Jul 25 1986		Application for stay filed (A-59) and order denying same by Rehnquist, J. on July 25, 1986.
4	Oct 15 1986		DISTRIBUTED. October 31, 1986
5	Oct 14 1986	X	Brief amicus curiae of Conference of Private Organizations filed.
6	Oct 14 1986	X	Brief amicus curiae of California filed.
7	Oct 14 1986	X	Brief amicus curiae of Internatl. Assn. of Lions Clubs filed.
8	Oct 15 1986	X	Motion of appellees Rotary Club of Duarte, et al. to dismiss or affirm filed.
9	Oct 15 1986	X	Brief amicus curiae of Kiwanis International filed.
10	Oct 30 1986	X	Reply brief of appellant Bd. of Dir. of Rotary Intl. filed.
11	Nov 3 1986		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. Justice Blackmun and Justice O'Connor OUT. *****
12	Nov 28 1986	G	Motion of California for leave to intervene filed.
14	Dec 8 1986		DISTRIBUTED December 12, 1986 (above motion)
15	Dec 15 1986		Motion of California for leave to intervene GRANTED. Justice Blackmun and Justice O'Connor OUT.
16	Dec 13 1986		Joint appendix filed.
17	Dec 18 1986		Brief of appellant Bd. of Dir. of Rotary Intl. filed.
18	Dec 19 1986		Record filed.
19	Dec 18 1986		Brief amicus curiae of Conference of Private Organizations filed.
20	Dec 18 1986		Brief amicus curiae of Boy Scouts of America filed.
21	Dec 18 1986		Brief amicus curiae of Pilot Club International, et al. filed.
22	Dec 24 1986	G	Motion of California for divided argument filed.
24	Jan 9 1987		Order extending time to file brief of appellee on the merits until January 23, 1987.
25	Jan 20 1987		Motion of California for divided argument GRANTED. Justice Blackmun and Justice O'Connor OUT.
26	Jan 20 1987		Brief amicus curiae of Anti-Defamation League of B'Nai B'Rith filed.
27	Jan 20 1987		Brief amicus curiae of Lloyd Lions Club filed.
28	Jan 20 1987		Brief amicus curiae of American Jewish Congress, et al.

Entry	Date	Note	Proceedings and Orders
		filed.	
29	Jan 28 1987	Brief of California, Intervenor filed.	
30	Jan 28 1987	Brief amicus curiae of CA Women Lawyers, et al. filed.	
31	Jan 28 1987	Brief amicus curiae of City of New York, et al. filed.	
32	Jan 28 1987	Brief amicus curiae of Minnesota, et al. filed.	
33	Jan 28 1987	Brief amicus curiae of Rotary Club of Seattle, et al. and appendix filed.	
34	Jan 28 1987	Brief amicus curiae of Employment Law Center of Legal Aid Soc. of San Francisco filed.	
35	Jan 28 1987	Brief amicus curiae of Kiwanis Club of Ridgewood, et al. filed.	
36	Jan 28 1987	Brief of appellees Rotary Club of Duarte, et al. filed.	
37	Feb 6 1987	SET FOR ARGUMENT. Monday, March 30, 1987. (4th case)	
38	Feb 10 1987	CIRCULATED.	
39	Feb 26 1987	Opinion of NY Court of Appeals received and distributed.	
40	Mar 10 1987	X Reply brief of appellant Bd. of Dir. of Rotary Intl. filed.	
41	Mar 30 1987	ARGUED.	

86-421 (1)

Supreme Court, U.S.  
FILED

SEP 15 1986

JOSEPH F. SPANIOL, JR.  
~~CLERK~~

No. 86-

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

*Appellants,*

v.

ROTARY CLUB OF DUARTE, et al.,

*Appellees.*

**Appeal from the Court of Appeal  
of the State of California,  
Second Appellate District**

**JURISDICTIONAL STATEMENT**

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## QUESTIONS PRESENTED

This appeal presents the following questions under the United States Constitution:

Does the decision of the California Court of Appeal, construing the Unruh Civil Rights Act, Cal. Civ. Code § 51, to require the admission of females to all-male local Rotary clubs, unconstitutionally infringe upon the First Amendment associational rights of the members of such clubs, where there is an average membership of 46, selective membership requirements, an official and genuine policy of discouraging the use of membership for commercial gain, and a principal purpose of promoting fellowship for the non-commercial and non-economic objectives of securing the voluntary, uncompensated participation of business and professional men in a variety of civic, eleemosynary and charitable service activities?

Is the Unruh Act, construed by the California Court of Appeal as applicable to such clubs, unconstitutionally vague and overbroad as an instrument for regulating memberships protected by First Amendment freedom of association?

## PARTIES

Pursuant to the Supreme Court Rules 12 and 15, the appellants file this, their statement of the bases on which they contend that the Supreme Court of the United States has appellate jurisdiction to review the judgment appealed from herein. Appellants are Board of Directors of Rotary International and Rotary District 530. Appellees are Rotary Club of Duarte, Mary Lou Elliott and Rosemary Freitag.<sup>1</sup>

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<sup>1</sup> In accordance with the Supreme Court Rule 28.1 counsel states that Rotary International may be considered the "parent" of Rotary District 530, Rotary Club of Duarte, and all other Rotary Districts and local Rotary clubs. Further, in accordance with Supreme Court Rule 28.4(c), appellants note that the constitutionality of a California statute is drawn in question in this case, and neither the State nor any agency, officer, or employee thereof is a party. Consequently, 28 U.S.C. § 2403(b) may be applicable, and this Jurisdictional Statement has been served upon the Attorney General of California.

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**Appeal from the Court of Appeal  
of the State of California,  
Second Appellate District**

**JURISDICTIONAL STATEMENT**

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**OPINIONS BELOW**

The Memorandum of Decision of the Superior Court of the State of California for the County of Los Angeles was issued on January 28, 1983. It is not reported but is printed as Appendix A. The Statement of Decision of that court was filed on March 21, 1983 and is also unreported but is printed as Appendix B. The opinion of the Court of Appeal was filed on March 17, 1986 and modified on April 9, 1986. It appears in 178 Cal.App. 3d 1051 (1986), and is printed as Appendix C. The California Supreme Court issued its order

denying appellants' petition for review on June 18, 1986. Said order is printed as Appendix D.

### **JURISDICTIONAL GROUNDS**

The Notice of Appeal was filed in the Court of Appeal on July 15, 1986. A copy thereof is printed as Appendix E. The time within which to docket this appeal expires on September 16, 1986, and timely docketing has been made. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) and 28 U.S.C. § 2101(c). Appellants squarely challenged the constitutionality of the Unruh Act, if construed to require the admission of females to local Rotary clubs, and the California Court of Appeal squarely sustained its validity, as so construed. The California Supreme Court declined to review the decision of the Court of Appeal.

### **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

This case involves the constitutionality of the California Unruh Civil Rights Act under the First and Fourteenth Amendments to the United States Constitution. [App. H]

The Unruh Act, Cal. Civ. Code § 51, provides in pertinent part:

All persons within the jurisdiction of this State are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

In addition, the pertinent provisions of California Civil Code § 52 are as follows:

Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of sex, color, race, religion, ancestry, or national origin contrary to the provisions of Section 51 . . . is liable for each and every such offense for the actual damages, and such amount as may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than two hundred fifty dollars (\$250), and such attorney's fees as may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51 . . .

### STATEMENT OF THE CASE

Rotary International is a worldwide association of local Rotary clubs. An individual Rotarian is a member of a local club, not of Rotary International; all local clubs are members of Rotary International. [Rotary Basic Library, Focus on Rotary, vol. 1, p. 1]<sup>2</sup>

Membership in Rotary is restricted to business and professional men, is by invitation only, and is highly selective. [Rotary Basic Library, Focus on Rotary, vol. 1, pp. 1-2; App. B-4]

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<sup>2</sup>The 1981 edition of Rotary's Manual of Procedure and the seven volume Rotary Basic Library were exhibits to the deposition of Herbert A. Pigman, General Secretary of Rotary International. Mr. Pigman's deposition and these documents were admitted into evidence pursuant to a written Stipulation Regarding Certain Undisputed Facts and Related Portions of the Record. The Stipulation and deposition are printed as Appendices F and G. The California Court of Appeal, on its own motion, augmented the record on appeal to include the 1981 Manual of Procedure and the Rotary Basic Library, both of which are cited from time to time herein.

The primary purpose of Rotary is to encourage a fellowship among business and professional men representing a diverse cross-section of the local community. Associational congeniality among Rotarians is of major importance. [App. B-3]

In 1977 the Rotary Club of Duarte (Duarte) admitted Donna Bogart, Mary Lou Elliott and Rosemary Freitag as active regular members in contravention of the Constitution and By-Laws of Rotary International. [App. C-7] After full compliance with its notice and hearing requirements, Rotary International, acting through its Board of Directors, revoked Duarte's charter and terminated its membership. [App. C-8] On January 8, 1979, Duarte and two of the three women, Elliott and Freitag, filed an amended complaint for injunctive and declaratory relief against the Board of Directors of Rotary International, Rotary District 530 and the district governors of District 530 for the fiscal years 1977-1978 and 1978-1979. The two individual defendants were later dismissed.

In their amended complaint, plaintiffs sought (1) to enjoin the defendants from declaring Duarte's charter null and void, from compelling delivery of the charter to any representative of Rotary International, and from enforcing those provisions of Rotary International's Constitution and By-Laws restricting membership in local clubs to males and (2) a declaration that the acts of defendants violated the Unruh Act.<sup>3</sup>

The matter was tried before the trial court without a jury, defendants asserting, among other defenses, that to require

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<sup>3</sup> Plaintiffs also alleged a violation of Article 1, section 8 of the California Constitution. The trial court held that this constitutional provision requires state action and was inapplicable. The Court of Appeal did not rule on this issue.

local Rotary clubs to admit females would violate their associational rights under the First and Fourteenth Amendments to the United States Constitution. The trial court entered judgment in favor of defendants, finding that Duarte, Rotary International and District 530 were not "business establishments" within the meaning of the Unruh Act, and that they were not organizations providing "goods, services and facilities" to their members. It further found that to preclude enforcement of Rotary's male-only policy would unconstitutionally infringe the associational rights of many Rotarians and "would materially affect the operation of Rotary not merely outside the State of California but outside the United States." The trial court also found that plaintiffs had not proven that enforcement of the male-only policy and expulsion of Duarte from Rotary International had caused any damage to Duarte or to the individual plaintiffs or women in general.

The Court of Appeal reversed, finding that both Duarte and Rotary International were business establishments within the meaning of the Unruh Act. The Court of Appeal held that, as business establishments, Duarte and Rotary International were guilty of "arbitrary" sex discrimination, and that to enforce the Unruh Act against them did not violate the First and Fourteenth Amendments. It ordered reinstatement of Duarte as a member of Rotary International and a permanent injunction against enforcement of the male-only membership restriction against Duarte. The California Supreme Court denied a petition to review the decision of the Court of Appeal.

### **REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL**

The California Unruh Civil Rights Act generally requires free public access to all business establishments. However,



the California Court of Appeal has applied that Act, which prohibits any form of "arbitrary" discrimination in the provision of goods and services to the public, to preempt and govern the membership policies of a local Rotary club. This holding places in grave doubt the rights of a broad range of selective membership organizations to determine and apply *any* standards for membership, including those specific standards which provide unifying principles of affiliation. If allowed to stand, this decision will severely inhibit the exercise of associational freedom, not only in California, but throughout the Land.

# **I. UNIQUE CHARACTERISTICS OF ROTARY DISTINGUISH IT FROM THE JAYCEES AND NECESSITATE SUPREME COURT CLARIFICATION OF THE BREADTH OF CONSTITUTIONALLY PROTECTED FREEDOM OF ASSOCIATION**

## **A. Rotary Is a Service Organization, Selective in Its Membership, Which Does Not Treat Its Members as Customers, Which Lacks Commercial Motivation, in Which Fellowship Is a Significant Aspect of Membership, and Which Has Well-Defined Policies Restricting Participation to Members; It Is Entitled to Freedom of Intimate Association**

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court reaffirmed its previous decisions upholding constitutionally protected freedom of association in two senses: freedom of intimate association and freedom of expressive association. It specifically recognized that the greatest protection must be accorded to freedom of intimate association in order to secure individual liberty.

... we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions



of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State . . . *See also Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974) . . . [468 U.S. at 618-619]

The referenced citation is to the majority opinion striking down an ordinance excluding all-white groups from public facilities. Quoting the famous dissent of Justice Douglas in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), Justice Blackmun said:

"The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." 407 U.S., at 179-180. The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change. [*Gilmore v. City of Montgomery*, 417 U.S. at 575]

At the same time, this Court, in *Roberts*, held that only relationships with the qualities of "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship . . . are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." [468 U.S. at 620] The Court cited the concurring opinion of Justice Powell in *Runyon v. McCrary*, 427 U.S. 160, 187-189 (1976), in which he stressed that it is not easy to draw a "bright line" between private, personal associations and those in which

"[t]here was no plan or purpose of exclusiveness." He noted that a "gray area necessarily exists in between" protected selective associations and commercial enterprises.

This case affords the Court an excellent opportunity to narrow and lighten such "gray area." *Roberts* involved an organization (the Jaycees) which regarded its "members more as customers than as owners," and which sold a product to the general public. "The product being sold is membership in an organization whose aim is the [commercial] advancement of its members." *United States Jaycees v. McClure*, 305 N.W.2d 764, 769 (Minn. 1981). If an organization, such as the Jaycees, is engaged in "unselective, vigorous sale of memberships, the national organization is engaged in a *public* business." *Id.* at 771 (emphasis in original). Additionally, if an organization, like the Jaycees, invites women or other non-members to share the group's views and philosophy and to participate in much of its training and community activities, its claim of right to exclude females or any other broad class of persons from membership on freedom-of-association grounds is substantially impaired.

On the other hand, a service organization, selective in its membership, which does not treat its members as customers, which exists, not to deliver services to its members, but to cause its members to render service to the public, which lacks commercial motivation, in which fellowship is a significant aspect of membership, and which has well-defined policies restricting participation in its activities to members, should be held to fall on the protected side of the "line."

In the instant case, applying these fundamental constitutional principles, and guided by the Minnesota Supreme Court's decision in the Jaycees case, the trial court made

findings of fact, supported by substantial evidence, which distinguished that case and balanced the equities in favor of Rotary. Under California law such findings are entitled to precedence over contrary resolutions of conflicting evidence made by an appellate court.<sup>4</sup>

Rotary International is a worldwide association of local Rotary clubs. In August 1982 there were 19,788 local clubs

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<sup>4</sup> Where a claim is made that a decision of a state court violates First and Fourteenth Amendment rights, this Court will make an independent review of the facts found by the state court. See generally *Jacobellis v. State of Ohio*, 378 U.S. 184 (1964); *Connick v. Myers*, 461 U.S. 138, 150 n. 10 (1983), and cases cited therein. In making such independent review, the following elements of California appellate law should be borne in mind:

(a) When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination whether there is *any* substantial evidence *contradicted or uncontradicted* which will support the finding of fact. *Primm v. Primm*, 46 Cal.2d 690, 693, 299 P.2d 231 (1956); *Estate of Bristol*, 23 Cal.2d 221, 223-224, 143 P.2d 698 (1943); *Foreman & Clark Corp. v. Fallon*, 3 Cal.3d 875, 881, 479 P.2d 362 (1971); *Neel v. Farmer's Insurance Exchange*, 21 Cal.3d 910, 922, 585 P.2d 980 (1978); *Estate of Leslie*, 37 Cal.3d 186, 689 P.2d 133 (1984).

(b) A reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. *Foreman & Clark Corp. v. Fallon*, 3 Cal.3d at 881.

(c) In applying the substantial evidence rule, an appellate court looks only at the evidence supporting the successful party and disregards the contrary showing. *Day v. Rosenthal*, 170 Cal.App.3d 1125 (1985).

(d) Unless appellant's brief sets forth all the evidence (not merely favorable evidence), any objections to the evidentiary support of the trial court's findings are waived. *Franck v. Polaris*

in 157 different countries with a total membership of approximately 907,750. [App. C-5] Thus, the average membership of a local club was 46. Duarte had a membership of 21 at the time its charter was withdrawn.

Membership in Rotary is restricted to males and is by invitation only. [Rotary Basic Library, Focus on Rotary, vol. 1, pp. 1-2; App. B-4] Rotary does not permit the use of its name by women's clubs, nor may such clubs become members of Rotary International and participate in its conventions and other forms of administration. [1981 Manual of Procedure, pp. 155-156]

Rotary is highly selective in its membership. [App. B-4] Rotary membership is neither solicited from nor is it available to the public generally. [App. B-5] Membership is always personal; it does not represent a company membership. [Pigman deposition, App. G-16] Each local Rotary

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*E-Z Go Div. of Textron, Inc.*, 157 Cal.App.3d 1107 (1984); *Foreman & Clark Corp. v. Fallon*, 3 Cal.3d at 881.

(e) An appellate court has limited power to substitute its discretion for that of a trial court in injunctive proceedings. *Union Interchange, Inc. v. Savage*, 52 Cal.2d 601, 90 P.2d 327 (1959); *Family Record Plan, Inc. v. Mitchell*, 172 Cal.App.2d 235, 342 P.2d 10 (1959).

The Court of Appeal's pervasive challenges to the presumption of validity that attaches to trial court findings not only violate California appellate law, they also constitute a classic example of what this Court has deemed a "fundamental error" in First Amendment cases—misplacing the burden of proof to require the party exercising a First Amendment right to justify (by a showing of substantial evidence) the particular manner in which such freedom is exercised. *See Healy v. James*, 408 U.S. 169, 183-185 (1972). California has enunciated a similar First Amendment "presumption of immunity" from state regulation. *Britt v. Superior Court*, 20 Cal.3d 844, 574 P.2d 766 (1978).

club seeks its members from the business and professional leaders within a clearly-defined geographical community approximating a single municipality in size. There is generally only one local Rotary club in any given geographical community. [App. B-2; 1981 Manual of Procedure, p. 205] Each Rotary club is governed by an elected board of directors. [Rotary Basic Library, Focus on Rotary, vol. 1, p. 70]

Rotary imposes a "classification" system limiting the number of members in a local club from any single line of business or profession. [App. B-4; Rotary Basic Library, Focus on Rotary, vol. 1, pp. 2, 67, Club Service, vol. 2, p. 7]

Rotary International has adopted Recommended Club By-Laws for local clubs which set forth the procedures for admission of new members. The name of a candidate for admission must be proposed to the local club by the membership committee or by an active, senior active, or past service member. The sponsor submits the candidate's name to the club's board of directors on a membership proposal card. The board sends the card to the classifications committee and the membership committee. The former makes sure that there is an open classification of business or profession and that the prospective member's business or profession is accurately described by that classification. The latter evaluates the candidate from the standpoint of character, business and social standing, and general eligibility. To avoid embarrassment, the candidate's name is kept confidential throughout this preliminary procedure and the candidate himself is not told of these investigations.

If the reports of both committees are favorable and the board approves them, the candidate's name, business and classification are published to the members. If there is no written objection received by the board within 10 days, the candidate becomes a member. If there is such an objection,



membership requires a further approving vote by the board. [Rotary Basic Library, Club Service, vol. 2, pp. 29-32]

An active member must work in a leadership capacity (owner, partner, manager, *et al.*) in the business or profession in which he is classified and must work or live within the club's territory. [Rotary Basic Library, Club Service, vol. 2, p. 32] There is no provision by which a member of a Rotary club may transfer his membership from one club to another. [1981 Manual of Procedure, p. 135]

The primary purpose of Rotary is to encourage a fellowship among business and professional men. In addition to the encouragement of fellowship for its own intrinsic merit, Rotary uses that fellowship to promote a variety of voluntary, civic, eleemosynary, and charitable "service" activities undertaken by the local clubs with the guidance and assistance of Rotary International. [Pigman deposition, App. G-23, G-26; App. B-3] To ensure that the undivided interest and energy of Rotarians are addressed to Rotary's membership obligations, Rotarians are urged not to belong to other service clubs. [1981 Manual of Procedure, p. 135]

Rotary's "male-only" policy had its origin many years ago in the quality of fellowship desired by Rotary's founders. However, as Rotary grew nationally and internationally, that membership policy grew into a fundamental and broadly accepted principle of Rotarian operation, cherished not only for the quality of fellowship which it provided, but also to a material extent because of the demonstrated fact that, as a "male-only" organization, Rotary has been able to operate effectively over a worldwide base of varied cultures and social mores. [Pigman deposition, App. G-50—G-53; App. B-5—B-6]

For many years the official and genuine policy of Rotary International has been to discourage the seeking or giving of

preferential business among Rotarians or the use of Rotary club membership for commercial gain. The 1981 Manual of Procedure specifically provides: "Any use of the fellowship of Rotary as a means of gaining an advantage or profit is foreign to the spirit of Rotary." [Pigman deposition, App. G-34—G-37; App. B-3; Rotary Basic Library, Focus on Rotary, vol. 1, pp. 2, 68; 1981 Manual of Procedure, p. 154] This policy dates from at least as early as 1934. [Pigman deposition, App. G-36]

The importance of associational congeniality among Rotarians is substantial. Demanding and strictly enforced standards for attendance at weekly meetings result in an average worldwide attendance of 80 percent. [Pigman deposition, App. G-22—G-23; App. B-3] Meetings are not open to the public. [Pigman deposition, App. G-25] The Rotary club is intended to be really a *club*—a body of men who are knit together in bonds of personal friendship and service. [Rotary Basic Library, Focus on Rotary, vol. 1, pp. 67-68]

In *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981), the Minnesota Supreme Court held that the Jaycees could not properly exclude women from membership because it was a "public" as opposed to a "private" organization, such as Kiwanis International. This Court agreed with the distinction:

... we read the illustrative reference to the Kiwanis Club, *which the record indicates has a formal procedure for choosing members on the basis of specific and selective criteria*, as simply providing a further refinement of the standards used to determine whether an organization is "public" or "private." [Roberts, 468 U.S. at 630][emphasis added]

Significantly, Rotary shares many of the key characteristics of Kiwanis, as enunciated in *Kiwanis Club of Great Neck v. Board of Trustees of Kiwanis International*, 374

N.Y.S.2d 265 (1975). Like Kiwanis, Rotary is a service organization the objectives of which have no commercial implications. Also like Kiwanis, it has selective standards for the admission of members and a plan for screening prospective members. Each local club is run by a board elected by the members. It meets the standards and criteria of a private club.

In affirming the trial court decision holding that women need not be admitted to Kiwanis, the New York Court of Appeals agreed with the characterization of Kiwanis as a private organization and added:

Although the Kiwanis Clubs' community-oriented activities may extend into the public sphere, the intrusion indicated on this record is not so extensive, or of the quality, as to permit governmental supervision of essentially private activity in the constitutional sense. [41 N.Y.2d 1034 (1977)]

The trial court here found that Rotary is quite unlike the Jaycees but that there is "substantial similarity" between Rotary and Kiwanis. [App. B-9, B-11—B-12] It held that Rotary is fully entitled to claim constitutional protection for its freedom of association. The Court of Appeal, however, held that membership in personal, social, private organizations is governed by anti-discrimination laws. Faced with uncontradicted evidence that the average local Rotary club, the only Rotary organization to which an individual Rotarian belongs, has only 46 members, that the average attendance at weekly meetings is 80%, that selective membership criteria are strictly adhered to, and that fellowship in service is the principal purpose of Rotary, the Court of Appeal stressed the large number of local Rotary clubs which make up Rotary International and held that "membership in International" is far from "continuous, personal and social." [App. C-27] Actually, of course, there is no individual



membership in Rotary International. Rotary International is only an association of small, local and "truly private" Rotary clubs.

With respect to such local clubs, the Court of Appeal, in direct opposition to the position of the New York Court of Appeals in the *Kiwanis* case, found it significant that "the community services performed by local Rotarians clearly take place in 'public view.' " [App. C-28] The court failed to see the vital difference between closely-knit members of a private organization rendering public service out of a sense of dedication and the sale of services to the public by a public business. [Pigman deposition, App. G-33—G-34, G-45]

The Court of Appeal further held that "[s]ubstantial business benefits regardless of whether they are of a primary or secondary concern must be considered . . . ." [App. C-23] While it accepted as factual that "[t]oday, official policy promulgated by International through its Board 'specifically prohibits any attempt to use the privilege of membership for commercial advantage,' " the Court of Appeal asserted that this does not mean "that commercial advantages and business benefits have in actuality ceased to flow from Rotary membership." [App. C-24]

However, the court did not refer to the admission of the two female plaintiffs that they did not join the Rotary Club of Duarte for the purpose of promoting their business and professional careers, nor did they feel that they had been impeded in their pursuit of any such careers by any actions of Rotary International. [Stipulation, App. F-4]

Moreover, the fact that incidental business benefits accrue to the members of many, if not most, truly private associations is and must be irrelevant to such associations' constitutional right to freedom of association. Take, for

example, a hypothetical poker club comprised of seven male executives of seven major corporations. Can anyone seriously contend that a state statute could constitutionally compel such a club to admit a female executive simply because, in addition to the fellowship enjoyed by the members over their weekly game and the exchange of "smoking room" stories, business relationships are fostered and business benefits enjoyed? Business relationships are a natural, not an unusual, outgrowth of friendship. Yet the Court of Appeal was able to disregard "personal and social interaction" because of the "commercial aspects of the relationship."

Confronted directly with the standards set forth by this Court in *Roberts*, the Court of Appeal stated:

While the membership criteria set forth by International and by which local clubs must abide is *selective*, the immense size of International and the number of Rotarians throughout the world is hardly indicative of an intimate relationship. Moreover, while *fellowship and service to the community play a very important part* in the Rotary organization, the business benefits and commercial advantages to be gained are also clearly an inducement for the business and professional leaders of the community to join. [App. C-35—C-36] [emphasis added]

Selectivity, fellowship and service were held to be insufficient to show that Rotary clubs possess the "distinctive characteristics" to entitle them to claim freedom of intimate association. Following appellants' filing of a petition for rehearing which it denied, the Court of Appeal deleted the first sentence quoted above and stated that the classification principle only appears to be selective, because its purpose is "to produce an 'inclusive', not 'exclusive' membership." [App. C-2]

Whether one regards membership criteria which restrict membership to a single member of each categorized business and profession—and that member to a “leader”—as “inclusive” or “exclusive,” it can hardly be denied that such criteria are extremely “selective.”

Significantly, the Court of Appeal omitted any mention of the other selective criteria of Rotary membership, i.e., potential members being screened “for the integrity of their reputation in the business community, for their dedication to the ‘service’ objectives of Rotary, and for their willingness and ability to abide by the rigorous attendance and participation standards of Rotary.” [App. B-4—B-5]

The standards employed by the Court of Appeal in deciding the issue of freedom of intimate association are clearly erroneous. Furthermore, they are in direct conflict with the holding of the New York Court of Appeals in *Kiwanis Club of Great Neck v. Board of Trustees of Kiwanis International*, 41 N.Y.2d 1034 (1977). This Court should accept jurisdiction of this appeal and order briefs on the merits and oral argument.

**B. Rotary Is Not Engaged in The Distribution of Publicly Available Goods and Services; No Compelling Reason Exists to Eliminate Its Male-Only Membership and Deprive It of Freedom of Expressive Association to Its Severe and Irreparable Harm**

In *Roberts*, this Court also reaffirmed the fundamental First Amendment right of freedom of expressive association:

According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. See, e.g. *Gilmore v. City of Montgomery*, 417 U.S., at 575; *Griswold v. Connecticut*, 381 U.S., at 482-485; *NAACP*

v. *Button*, 371 U.S. 415, 431 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S., at 461. (sic) [468 U.S. at 622]

The first cited case involved a number of all-white groups seeking to use a public park from which they had been barred. No showing was made that such groups constituted "truly private clubs," yet their associational rights were protected.

Similarly, the NAACP is assuredly not a "private club." Its membership criteria are substantially less selective than those of Rotary. Its constitution provides that "any person who is in accordance with its principles and policies . . . may become a member." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958). Membership was shown to be aggressively solicited through an interstate network of regional and local affiliates and the organization was required to register as a business. *Id.* at 451-452. Its objectives were substantially commercial, i.e., "... to advance the interests of colored citizens . . . and to increase their opportunities for . . . employment . . ." *Id.* at 451 n.1. Nevertheless, the Court held that such a large organization, broadly open to the public, is entitled to constitutional protection of its freedom of association.

Moreover, advancement of the financial benefit of members of an association is an associational right which cannot be abridged. *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967).

For First Amendment purposes, the question is not whether a group which asserts the right to freedom of expressive association is a "private club," but whether genuine associational purposes of the group exist and require constitutional protection.

In *Roberts*, the Court upheld a Minnesota statute "eliminating discrimination and assuring its citizens equal access to publicly available goods and services," as applied to the Jaycees. In reaching this conclusion the Court was governed by its finding that the Jaycees organization was engaged in offering "goods," "privileges" and "advantages" to the general public, but excluding women.

... The Minnesota court noted the various commercial programs and benefits offered to members and stated that "[l]eadership skills are 'goods,' [and] business contracts and employment promotions are 'privileges' and 'advantages' ..." 305 N.W.2d, at 772. Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests. [468 U.S. at 626]

... acts of invidious discrimination in the distribution of *publicly available* goods, services, and other advantages cause *unique evils* that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce *special harms distinct from their communicative impact*, such practices are entitled to no constitutional protection. [468 U.S. at 628] [emphasis added]

The differences between Rotary and the Jaycees, discussed at length above, are controlling here. The Jaycees was a commercial organization with incidental associational activities. Rotary is not. Rotary is not engaged "in the distribution of publicly available goods, services, and other advantages." Rotary is not "an organization engaged in providing goods, services, and facilities to its members as clients, patrons, or customers" [App. B-9]; its membership "is neither solicited from nor is it available to the public generally." [App. B-5] Its business benefits are limited to



its members and are incidental. Rotary members do not receive services; they render service. [Pigman deposition, App. G-33—G-34, G-45] Indeed, even the California Court of Appeal was compelled to recognize that Rotary is not "truly public." In defending its reading of the Unruh Act as requiring Rotary to admit women to membership in local Rotary clubs, that court said:

It [the Unruh Act] does not require International to change its objectives or to open membership to the entire *public at large*, nor does it invalidate its "inclusive, not exclusive," *selective* membership requirements. [App. C-2] [emphasis added]

Evidently, the Court of Appeal accepted as facts (i) that Rotary is not open to the public, and (ii) that it has selective membership requirements. Further, it evidently believed that neither of such facts causes "unique evils" which California has a compelling interest to prevent. *Only Rotary's failure to admit women was condemned*. But since Rotary is not a commercial organization engaged in distribution of "publicly available goods, services and other advantages," its conduct cannot be said to have produced "special harms" which would justify overriding its otherwise protected freedom of expressive association in this regard. *Roberts*, 468 U.S. at 628.

In *Roberts*, not only did the Court find a compelling state interest in preventing invidious discrimination in the distribution of publicly available goods and services, it held that admission of women would not impair the Jaycees' expressive associational rights, because there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." The Court noted that nonmembers regularly participated in activities of the Jaycees, and that women were

invited to participate in much of its training and community activities.

Here, on the other hand, meetings are not open to the public [Pigman deposition, App. G-25]; joint meetings with other service clubs are opposed [1981 Manual of Procedure, p. 36]; Rotarians are discouraged from joining other service clubs [1981 Manual of Procedure, p. 135]; and women have no place in the Rotary organization [1981 Manual of Procedure, pp. 155-156]. The trial court expressly found that the admission of women to membership in local California Rotary clubs:

... contrary to the long standing and democratically reaffirmed membership principles of Rotary would comprise a material interference with deeply felt choices of associational preference of many Rotarians. . . .

The Court accepts the testimony herein of Rotary's General Secretary . . . that the continued successful worldwide operation of Rotary is materially dependent on a delicate balance of divergent attitudes in diverse cultures, and that judicial interference with this balance, as reflected by votes in Rotary's Council on Legislation, would risk a material and harmful disruption of the existing cooperative integrity of Rotary International both inside and outside the State of California. [App. B-6—B-7; see Pigman deposition, App. G-46—G-53]

The trial court further held that to require the admission of women to local Rotary clubs "would inflict severe, irreparable and unconscionable harm upon Rotary and the associational rights of its members without commensurate or any substantial resulting economic benefit to women or the public." [App. B-9]

The Court of Appeal agreed that the evidence "supports the trial court's finding that the male-only-membership policy is valued by a substantial majority of Rotarians throughout the world and that, as a rule that has been internally agreed upon, it has enabled the organization to work effectively on a worldwide basis," but concluded that this was not sufficient to support a finding that "the admission of women into the local Rotary Club of Duarte would cause the downfall of the District or International or seriously interfere with Rotary's objective." [App. C-30—C-32] If First Amendment rights are constitutionally protected only when failure to do so would cause the "downfall" of the organization asserting such rights, then the Constitution is a frail reed indeed.

An accepted definition of "invidious" is "tending to cause discontent, animosity or envy." Webster's Collegiate Dictionary (7th Ed.) The aggressive policies of special interest groups such as unions, the NAACP, NOW and numerous others assuredly have caused discontent, animosity, and, where successful, envy, among many Americans. But discrimination in favor of a particular class does not cause such a group to lose First Amendment rights. Quite the contrary. The "intense resentment and opposition of the politically dominant white community" was a major factor perceived by this Court as necessitating protection of the NAACP's associational freedom. *NAACP v. Button*, 371 U.S. 415, 435 (1963).

While, of course, all legitimate organizations are the beneficiaries of these [First and Fourteenth Amendment] protections, they are all the more essential here, where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and "chilling" effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more



immediate and substantial. [*Gibson v. Florida Legislative Commission*, 372 U.S. 539, 556-557 (1963)]

At the present time, male-only organizations such as Rotary are encountering governmental and social hostility akin to that directed at the NAACP in the 1960's. However, it will not do to assert, as the Court of Appeal does, that because the male versus female discrimination practiced by such organizations is perceived as wicked, it is undeserving of constitutional protection. The First Amendment is both color-blind and gender-blind. Freedom of association is protected whether the group invoking the Constitution is perceived as "good" or "bad." Constitutional liberties are guarded regardless of whose ox is being gored.

For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered. [*NAACP v. Button*, 371 U.S. 415, 444-445 (1963)]

Rotary, Kiwanis, the Lions, the Soroptimists, the Girl Scouts, the Boy Scouts and the Boys' Clubs of America are all certainly no less entitled to First Amendment protection than the NAACP, the United Mine Workers, and thousands of other selective membership organizations which may be regarded by some court as "invidiously discriminatory."<sup>5</sup>

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<sup>5</sup> It is an interesting commentary on the mind-set of the California courts that decisions in that State have held that neither the Boy Scouts nor the Boys' Clubs are entitled to First Amendment protection against the application of the Unruh Act. Exclusion of a homosexual from a leadership position in the Boy Scouts and exclusion of girls from membership in the Boys' Club of Santa Cruz both were held to be unlawful under that Act.

The decision of the Court of Appeal in the instant case deprives Rotary of its constitutional right to freedom of expressive association. Taken together with the recent California decisions involving the Boy Scouts and the Boys' Club of Santa Cruz, it casts serious doubt on the present-day viability of that vital right. This Court should note probable jurisdiction in this case to permit briefs and oral argument on the merits.

## II. THE UNRUH ACT AS CONSTRUED BY CALIFORNIA COURTS IS BOTH VAGUE AND OVERBROAD

The pertinent standard for evaluating unconstitutional vagueness was reiterated in *Roberts*:

The void-for-vagueness doctrine reflects the principle that "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [468 U.S. at 629][citation omitted]

In other cases, this Court has expanded further on the necessity for the doctrine:

A vague law impermissibly delegates basic policy matters to . . . judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . . where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms', it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful

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*Curran v. Mt. Diablo Council of the Boy Scouts of America*, 147 Cal.App.3d 712 (1983); *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 707 P.2d 212 (1985).

zone' . . . than if the boundaries of the forbidden areas were clearly marked. [*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972), cited in *Roberts*.]

So important is it that a statute, to be constitutional, must not be vague or overbroad, that its status in such regards may be raised even by one to whom, as applied, it is neither. *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

In light of these principles, let us take a brief look at the Unruh Act and its construction by the California courts. It provides that all persons, regardless of "their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accomodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." While these words do not appear to be vague or overbroad, note that the Unruh Act actually "accords every person an individual right against 'arbitrary' discrimination of any kind, whether or not expressly set forth in the statute." *Isbister v. Boys' Club of Santa Cruz*, 40 Cal.3d 72, 86, 707 P.2d 212 (1985); see also *In re Cox*, 3 Cal.3d 205, 474 P.2d 992 (1970). The person of common intelligence must therefore be able to determine not only that specified types of discrimination are bad, but that any other "arbitrary" discrimination is also forbidden.

But what is "arbitrary"? The Court, in *Cox*, held that "this broad interdiction of the act is not absolute; [an organization] may establish *reasonable* regulations that are rationally related to the services performed and facilities provided." *Id.* at 212.

Thus, it is permissible for housing to exclude all but the elderly. On the other hand, it is unreasonable to exclude children from a rental facility lacking facilities for children. *Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721, 640 P.2d 115 (1972).

Indeed, it has been held that exclusion of *any* class of persons is *per se* unlawful, so that exclusion of a homosexual from a leadership position in the Boy Scouts cannot be justified:

Nor can an exclusion be justified only on the ground that the presence of a class of persons does not accord with the nature of the organization or its facilities. [*Curran v. Mt. Diablo Council of the Boy Scouts of America*, 147 Cal.App.3d 712, 733 (1983)]

Yet it remains California law that discrimination against the handicapped is not barred by the Unruh Act. *Marsh v. Edwards Theatres Circuit, Inc.*, 64 Cal.App.3d 881 (1976).

Were these confusing and apparently contradictory decisions not enough, the California Supreme Court has recently cast doubt on the entire concept of "reasonable regulations that are rationally related to the services performed and facilities provided." *In re Cox*, 3 Cal.3d at 212. In ruling that it is impermissible to restrict membership in a boys' club to boys, even though the purpose of the club is to combat juvenile delinquency, and boys are four times more likely than girls to get into trouble with the law, the court said:

Nor can we accept Justice Kaus' suggestion that the Club has obeyed the Act because its decision to devote its resources to the greater delinquency problem it perceives among male youth is "rational" and taken in "good faith." *Marina Point* made clear that "reason" and "good faith" are not enough to avoid a finding of "arbitrary" discrimination. [*Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 707 P.2d 212 (1985)]

If a person can determine what forms of discrimination are "arbitrary" under the Unruh Act while at the same time "rational" and in "good faith," or what "reasonable regulations that are rationally related to the services performed

and facilities provided" will be permitted, he or she must indeed be an uncommon person of common intelligence. Note the strong dissents in both *Marina Point* and *Isbister* as evidence that even Supreme Court Justices cannot readily determine what is and is not safe conduct. The problem arises from the concept that, as stated in *Cox*, "all arbitrary discrimination" is prohibited by the Act. "Arbitrariness" lies in the eye of the beholder; its use as a litmus test for the propriety or impropriety of otherwise constitutionally protected conduct renders the Unruh Act itself unconstitutional. As well stated by Justice Richardson, dissenting in *Marina*:

... If the issue before us is, as framed by the majority... should we approve "wholesale discrimination against children," or the "universal exclusion of children from housing" or sanction "the sacrifice of the well-being of children on the altar of a landlord's profit, or possibly some tenants' convenience," the answer is a thundering "no." We'll choose children over a landlord's profit and greed every time. If, however, the question is put a little differently, and we inquire—do our middle aged or older citizens, having worked long and hard, having raised their own children, having paid both their taxes and their dues to society retain a right to spend their remaining years in a relatively quiet, peaceful and tranquil environment of their choice? The answer to such a question is, why not? [30 Cal. 3d at 745.]

Moreover, the impossibility of determining, in advance, what a California court will countenance and what it will strike down as "arbitrary" is not the end of the matter. The Unruh Act, by its terms, applies only to "business establishments." What, then, is a "business establishment"?

... the term "business establishments," consistent with the Legislature's intent to use the term in the broadest



sense reasonably possible, includes all commercial and noncommercial entities *open to and serving the general public*. Accordingly, we hold the Boy Scouts, of which the defendant is a part, is a business establishment within the meaning of the Unruh Act. [*Curran v. Mt. Diablo Council of the Boy Scouts of America*, 147 Cal.App.3d at 732-733] [emphasis added]

Under *Curran*, rights of free association only "restrain the Legislature from enacting anti-discrimination laws where *strictly* private clubs or institutions are affected." *Id.* at 731. "Since the essence of a private club or organization is exclusivity in the choice of one's associates, we find this approach ensures that private organizations remain protected." *Id.* at 731.

A club will not be regarded as private, however, where "recreational facilities [and membership] are open to the community generally but closed to members of a particular group." *Isbister*, 40 Cal.3d 72, 707 P.2d 212 (1985). In that case, as the dissent by Justice Kaus noted, the excluded "particular group" was everyone except boys from 8 to 18. He caustically commented that, in finding that the club was open to the community at large, the majority must have looked "at the included and excluded groups through different ends of a telescope."

In the instant case, the Court of Appeal concluded that little 21-member Duarte, with the restrictive membership policies of all local Rotary clubs except for its violation of the male-only rule, was a "business establishment," solely because it found that "there are business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers" and that such benefits are not "merely incidental." Gone is any reference to "open to and serving the general public" which was a key element in the definition of "business establishment" in *Curran*. It is an even further cry



from the Court of Appeal decision here to that of the Supreme Court in the earlier case of *Alcorn v. Anbro Engineering, Inc.*, 2 Cal.3d 493, 468 P.2d 216 (1970), where the Unruh Act was limited to discrimination by a business establishment "in the course of furnishing goods, services or facilities to its clients, patrons or customers." *Id.* at 500.

In *Roberts*, this Court stressed

The state court's articulated willingness to adopt limiting constructions that would exclude private groups from the statute's reach, together with the commonly used and sufficiently precise standards it employed to determine that the Jaycees is *not* such a group, establish that the Act, as currently construed, does not create an unacceptable risk of application to a substantial amount of protected conduct. [468 U.S. at 630-631]

The Unruh Act, as construed by the California courts, lacks even the semblance of "commonly used and sufficiently precise standards" to determine what organizations are subject to the Act, or, even more importantly, what forms of discrimination are barred. The Unruh Act is overbroad and vague as applied to Rotary, and, even if this were not so, it is overbroad and unconstitutional in general application. It provides for treble damages, injunctive relief, and the awarding of attorneys' fees, but provides no protection to parties unjustly accused of its violation. It has a chilling effect upon the First Amendment associational rights of every group in California which is not open to the entire public, and it must be struck down.

## CONCLUSION

Groucho Marx well expressed the basic human desire to select one's own associates when he said he would not wish to belong to any club that would admit someone like him.

Unfortunately, to the person excluded, admission frequently appears to offer far greener grass than is available outside—and, indeed, perhaps in some instances it does. But as Justice Douglas has so lucidly stated, the Constitution and the Bill of Rights exist to get “government off the backs of people.” *Schneider v. Smith*, 390 U.S. 17, 25 (1968). “Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.” *Moose Lodge No. 107*, 407 U.S. at 180; *Gilmore*, 417 U.S. at 575.

For the foregoing reasons, it is earnestly requested that probable jurisdiction be noted.

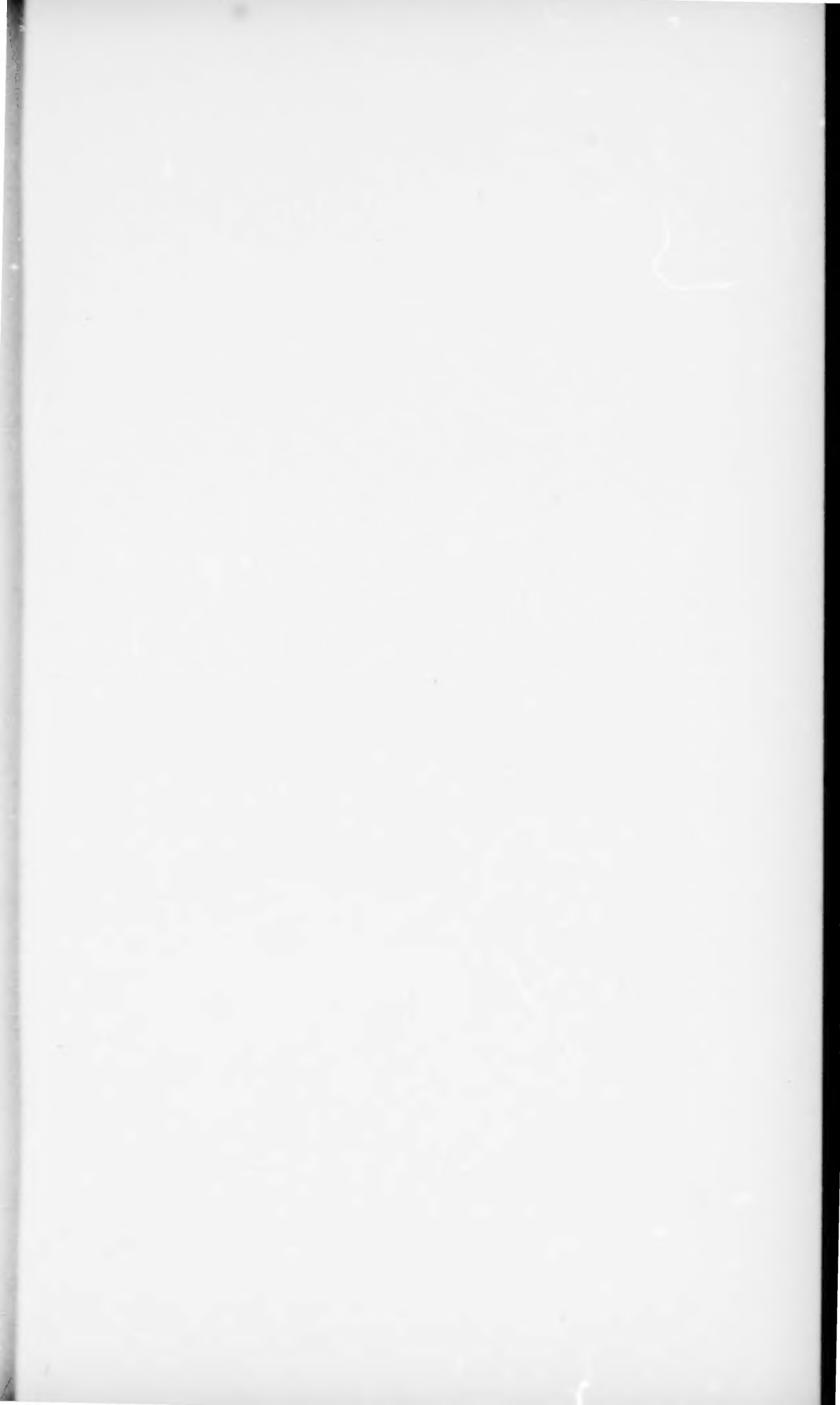
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86-421

Supreme Court, U.S.  
FILED

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

*Appellants,*

v.

ROTARY CLUB OF DUARTE, et al.,

*Appellees.*

**Appeal from the Court of Appeal  
of the State of California  
Second Appellate District**

**APPELLANTS' APPENDIX**

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## **APPENDIX A**



A-1

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ROTARY CLUB OF DUARTE, et al.,

*Plaintiffs,*

vs.

BOARD OF DIRECTORS OF ROTARY  
CLUB INTERNATIONAL, et al.,

*Defendants.*

No. C244753  
MEMORANDUM  
OF DECISION

**Factual Background**

In 1977, the Rotary Club of Duarte was experiencing a low level of membership (below Rotary International's minimum of 20 members per club).

The local club therefore began to recruit female members despite their knowledge that the bylaws of Rotary International limited membership to males. Three women were enrolled.

Thereafter, the local club was directed to drop the women as members or have their charter revoked. The Duarte club refused and subsequently lost its charter. It filed an appeal with Rotary International asking that the bylaws be changed to permit memberships by women.

In 1978, the appeal was heard at a session of Rotary International at Tokyo, Japan, the revocation was affirmed, and the international body voted not to change its bylaws.

Duarte then brought this lawsuit on its own behalf and on behalf of the three women (two of whom dropped out of the now X-Rotary Club of Duarte and out of the lawsuit).

Rotary Club International is a worldwide association of Rotary Clubs having nearly 1,000,000 members in approximately 20,000 clubs in 157 different countries. Individual members are required to attend a stipulated number of meetings each year, and, if they miss a meeting, or are traveling, they are required to "make up" the missed meetings at some other Rotary Club anywhere in the world. Obviously, the social mores of these clubs vary greatly. In the United States, the local Rotary Clubs receive their charters from Rotary Clubs International, an Illinois corporation.

Rotary Clubs have a restricted membership, other than gender, as only one person from each of a set list of business or professional categories, or subcategories, are permitted membership in a club, e.g., doctors, dentists, real estate brokers, salesman, etc. The subcategories are numerous.

Rotary's stated purpose is to seek a cross-section of the business and professional community by limiting the number of local club members drawn from any single business or profession. It does not discriminate on the grounds of race, religion or national origin and welcomes clubs having membership representative of the diverse origins of the local population.

The stated purposes of Rotary are to encourage fellowship among its members in order to promote a variety of charitable, civic and eleemosynary "service" projects undertaken by the local clubs, with the guidance and assistance of Rotary International. Rotary also undertakes "service" activities of broader geographical impact through a wide

variety of inter-club activities, including projects of international scope.

Rotary's "Manual of Procedure" provides:

"... a Rotarian should not expect, and far less should he ask for, more consideration or advantages from a fellow Rotarian than the latter would give to any other businessman with whom he is in business relations."

### **The Issues**

The amended complaint of the plaintiffs contains three causes of action which, in essence, may be stated as follows:

(1) The male only policy violates the California Unruh Act (Civil Code section 51) because Rotary is a "business establishment."

(2) The male only policy violates Article 1, section 8 of the California Constitution because exclusion from Rotary impedes women in pursuing a business, profession, vocation, or employment on the basis of sex.

(3) Acts of Rotary District Governor Paul Bryan in July 1977 estop Rotary from ever again requiring Duarte to restrict its membership to males.

Plaintiffs have explicitly limited their claims to these three elements of California law.

Moreover, plaintiffs have explicitly disclaimed asserting violation of federal law. In fact, plaintiffs successfully resisted an attempt to remove this case to the U.S. District Court where federal constitutional issues might be raised. The parties now concede there is no federal question involved because the U.S. Constitution limits state and public agency discriminatory actions and not those of individuals or private associations.



The legal issues to be decided are, therefore, very narrow.

### **The Constitutional and Statutory Law**

*Article 1, section 8* provides:

"A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color or national or ethnic origin."

*Civil Code section 51* provides in pertinent part:

"All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

### **Discussion**

#### *First Cause of Action*

The heart of the dispute in this case lies in the first cause of action dealing with the Unruh Act (Civil Code section 51, quoted *supra*).

The whole issue regarding the Unruh Act is whether Rotary is a "business establishment." There is a dearth of authority.

The plaintiffs rely heavily on *Burks v. Poppy Construction Company*, 57 C.2d 463; 20 Cal. Rpr. 609; 370 P.2d 313 (1962) where a black family sued a home builder who refused to sell to them. The issue was what constituted a "business establishment." Chief Justice Gibson held that "business establishment" should have the broadest possible construction and is not limited to a physical location. The

real thrust of that opinion, in the context of the present case, appears at page 468 as follows:

"The word 'business' embraces everything about which one can be employed, and it is often synonymous with '*calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain.*' " "... The word 'establishment' includes not only a fixed location, such as the 'place where one is permanently fixed for residence or business,' but also a 'commercial force or organization' ... (Emphasis added)

In 1970, the California Supreme Court amplified this definition as follows:

"However, there is no indication that the Legislature intended to broaden the scope of section 51 to include discriminations other than those made by a 'business establishment' in the course of furnishing goods, services or facilities to its clients, patrons or customers. *Alcorn v. Ambro Engineering, Inc.*, 2 C.3d 493; 86 Cal. Rptr. 88; 468 P.2d 216."

The Court cited with favor the article by Prof. Harold W. Horowitz in 33 U.S.C. Law Rev. 260 at 288-289, 294 where the history of Section 51 through its various drafts is discussed.

In a similar case, *Kiwanis Club of Great Neck v. Board of Trustees of Kiwanis International*, 374 N.Y.S. 2d 265 (1975), aff. 383 N.Y.S. 2d 383, the Court outlined the Constitution of International revealing its stated objectives as very similar to those of Rotary International.

While the *Kiwanis* decision was based on the Federal and N.Y. State constitutions and statutes, the Court does point out that the organization is private, and not public, in character, and not of a commercial nature:

"The fact that individual members may use their membership in a club to further their own business interests does not, in any way, change the avowed purposes of the organization, or convert it into a commercial club. (P. 268)"

California courts, in applying the Unruh Act have drawn a distinction between organizations that are either public or affected with a public interest and thus commercial in character, and organizations whose functions are private.

In *Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721 (1982) the California Supreme Court held that an "adult only" policy in a *rental* apartment complex involved a business establishment and violated the Unruh Act.

But, in *O'Connor v. Village Green Association*, 2d Civ No. 61853, 2d App. Dist., Div. 2 (1982) the appellate court distinguished *Marina* in a case involving a condominium and held that the rules of an association of private condominium owners constituted a private contract and that the Unruh Act would not apply.

In our case we have a group of people who already have their own diverse callings or occupations and who have associated themselves in a service organization which is not *itself* a calling, occupation, or trade engaged in for livelihood or gain.

The individual plaintiff's disclaimer of a pecuniary motive in joining Duarte emphasizes the Rotary objectives stated above which in essence say that Rotarians should not seek, or grant, business advantages from, or to, other Rotarians that would not be afforded non-Rotarian businessmen.

Finally, the Courts have tried to strike a balance between the equality and professional interests of those excluded and the associational interests of club members. As Mr. Justice Douglas, probably the most outspoken civil libertarian of our

time, stated in *Moose Lodge v. Irvis*, 407 U.S. 163, 179-180 (1972):

"My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permits all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or a woman who his or her associates may be. The individual may be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race."

While the quoted comment was in the context of the Bill of Rights, it illustrates the underlying precepts of our own state legislation.

In applying those precepts, we must not lose sight of the fact that, as a practical matter, the application of the Unruh Act to Rotary International might be in itself an unconstitutional extraterritorial act because its impact would be felt throughout the nation and the world where Rotary members are expected to exchange visits at other clubs. See 5 Witkin, Summary etc., Constitutional Law Sec. 289.

## Second Cause of Action

As to Article 1, Section 8, of the Constitution, plaintiffs have offered no proof that the female member has been *disqualified from entering or pursuing a business, profession, vocation or employment* because of her sex.

First of all, the applicants already engaged in a business or profession and no employment was denied them. They were

merely denied the privilege of joining with individuals from other vocations, professions and businesses in a community service organization.

The individual plaintiffs concede that they have not suffered any loss attributable to their rejection, further concede that they did not join Rotary in order to achieve professional advancement, but speculate that they might at some time in the future be denied career advancement because of a lack of Rotary status. They overlook the fact that women have a number of their own organizations akin to Rotary or Kiwanis in their Soroptomists, Zonta, and other clubs.

Plaintiffs rely on *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981) which held that the Jaycees could not reject women. In reaching that decision the Court pointed out that the Jaycees had *no* restrictions on numbers or business categories. Further the Jaycee literature refers to its members as customers and that Jaycees are selling "a product." The Court concluded that the Jaycees were a business.

However, in rejecting the national organization's claim that it should be treated as a private organization, the Court made this significant comment (p. 771):

"We, therefore, reject the national organization's suggestion that it be viewed analogously to private organizations such as Kiwanis International Organization."

The Court thus said, in effect, that it would rule differently as to Kiwanis. Rotary and Kiwanis are very similarly structured.

The only California cases cited as authority are those dealing with state regulatory agencies, and the thrust of the

court opinions is that this section only applies to state agencies. *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 8-10 (1971).

### **Third Cause of Action**

In the third cause of action, the plaintiffs allege that Paul Bryan, District Governor, attended one or more of Duarte's meetings and did not remonstrate about women being present. Bryan admits that he knew of their presence but testified that he never gave his approval.

It also appears that the women members were on the rosters submitted to the International in Illinois and were apparently overlooked. As soon as the matter was brought to the attention of the national officers they took action.

Plaintiffs have offered no authority that equitable estoppel will lie against a national organization where to do so would violate the international bylaws. Obviously a local, or district, officer would have no authority ostensible or otherwise, to create an estoppel.

Furthermore, the plaintiffs knew they were violating the bylaws at the outset. Their "unclean" hands prohibit their obtaining equitable relief. In any case, they were never misled to their detriment.

### **Conclusions**

For all the foregoing reasons, the injunction is denied and judgment will be entered for the defendants. Attorneys for defendants to prepare the judgment.

DATED: February 8, 1983

MAX F. DEUTZ  
MAX F. DEUTZ  
Judge of the Superior Court





## **APPENDIX B**



APPENDIX B

Attorneys for Defendants.

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

ROTARY CLUB OF DUARTE, MARY  
LOU ELLIOTT and ROSEMARY  
FREITAG,

*Plaintiffs,*

v.

BOARD OF DIRECTORS OF RO-  
TARY INTERNATIONAL, ROTARY  
DISTRICT 530, PAUL G. BRYAN, and  
OLIVER BATCHELLOR,

*Defendants.*

No. C 244, 253

STATEMENT  
OF DECISION

(C.C.P. § 632)

The above-entitled case came on regularly for trial on December 2, 1982 in Department 54 of the above-entitled Court, the Honorable Max F. Deutz, Judge presiding, without a jury. Trial was concluded on December 3, 1982. Sanford K. Smith, Esquire, Carol Agate, Esquire, and Fred Okrand, Esquire of the American Civil Liberties Union Foundation of Southern California appeared as counsel for plaintiffs. Wm. John Kennedy, Esquire and Darling, Hall & Rae appeared as counsel for defendants.

A "Stipulation Regarding Certain Undisputed Facts and Related Portions of the Record" together with the documentary material specified therein was received by the Court. Additional oral and documentary evidence was introduced on behalf of the respective parties. Both sides submit-

ted initial and supplemental trial briefs. The case was orally argued and submitted for decision on January 28, 1983. The Court issued a written Memorandum of Decision on February 8, 1983. The Court now, at the request of all parties, issues this Statement of Decision in accordance with California Code of Civil Procedure § 632.

The Court has determined that the following facts are true.

Rotary International is a worldwide association of approximately 20,000 local Rotary clubs in approximately 157 different countries. Membership in the local clubs includes approximately 1,000,000 business and professional men worldwide. Rotary International is an Illinois not-for-profit corporation having its principal office in Evanston, Illinois. It has not qualified to do business in California and has received no tax exemptions from the State of California.

Each local Rotary Club seeks its members from the business and professional leaders within a clearly-defined geographical community approximating a single municipality in size. There is only one local Rotary Club in any given geographical community. For purposes of administration, Rotary International groups geographically adjacent clubs into districts. The clubs in each district annually nominate a district governor who, after being elected by Rotary's annual international convention, serves as the field representative of Rotary International.

Plaintiff Rotary Club of Duarte ("Duarte") was a local Rotary club prior to its expulsion within Rotary District 530. Former District 530 governors Paul Bryan and Oliver Batchellor have been voluntarily dismissed as defendants.

The primary purpose of Rotary is to encourage a fellowship among business and professional men representing a diverse cross-section of the business and professional activities within the local community. In addition to the encour-

agement of fellowship for its own intrinsic merit, Rotary uses that fellowship to promote a variety of voluntary, civic, eleemosynary, and charitable "service" activities undertaken by the local clubs with the guidance and assistance of Rotary International. Additional assemblies, "service" projects, and other activities of broader geographical scope are also undertaken at the district, national and international level.

Although some individual Rotarians derive sufficient business advantage from Rotary to warrant deduction of Rotarian expenses in income tax calculations, or to warrant payment of those expenses by their employers, the Court finds that such business benefits are incidental to the principal purposes of the association which are to promote fellowship for *non-commercial*, and *non-economic* objectives and to secure the voluntary uncompensated participation of business and professional men in the aforesaid "service" activities. For many years the official and genuine policy of Rotary International has been to discourage the seeking or giving of preferential business custom among Rotarians or the use of Rotarian membership for commercial gain. Although Rotary on occasion sponsors vocational seminars for its members addressed to the general business interests of its membership, the Court finds such activity to be of subordinate importance to the aforesaid principal purposes of Rotary, and to be consistent with the purpose of encouraging disinterested fellowship among Rotarians.

The importance of associational congeniality among Rotarians is substantial. Demanding and strictly enforced standards for attendance at weekly meetings result in an average worldwide attendance of 80 percent. When conflicts prevent a Rotarian from attending his own club's meeting, he is required to "make-up" his attendance at the regular meeting of another club. Such "make-up" activities result in



substantial inter-club attendance. International travel results in a material amount of club visitation by foreign Rotarians. Attendance at weekly meetings is in addition to participation in the voluntary cooperative "service" projects which form a central part of Rotarian activity.

Rotary does not discriminate on the grounds of race, religion, or national origin and welcomes local clubs having memberships that are representative of the diverse origins of their local population. The plaintiff Duarte club had for many years prior to its expulsion been such a racially, religiously, and ethnically diverse club. However, in a number of other respects Rotary is highly selective in its membership.

In order to provide a diversity of fellowship, to prevent clubs from being dominated by a few business or professional segments of the community, and to encourage a broad awareness of community needs to be addressed by the "service" activities, Rotary imposes a "classification" system limiting the number of members in a local club from any single line of business or profession. Although this "classification" system appears to have originated many years ago from self-seeking commercial purposes, the Court finds that Rotary has for many years consciously, genuinely, and effectively abandoned use of the "classification" system as a device for encouraging preferential business relationships among Rotarians.

In addition to the "classification" system, local Rotary clubs, prompted by advice from Rotary International, screen potential members for the integrity of their reputation in the business community, for their dedication to the "service" objectives of Rotary, and for their willingness and ability to abide by the rigorous attendance and participation standards

of Rotary. Rotary membership is neither solicited from nor is it available to the public generally.

At the club membership level Rotary International, with the cooperation of the district governor, carefully screens new clubs to see that the community in which they propose to function is not already served by a local Rotary club, that the proposed new community contains a minimum of 50 separate "classifications", and that a minimum of 20 qualified business and professional men in 20 separate "classifications" are willing and available to start the new club. Each new club is then placed on a probationary basis to make certain it can effectively discharge its attendance, service and other Rotarian obligations.

A principal task of the district governor is to make an annual visit to and review of the local clubs in his district to see that they are remaining active, complying with the applicable Rotarian rules, and rendering effective "service" to their communities. Annual reports to Rotary International on each local club give a detailed review of membership level, attendance level, and a description of the "service" activities of the club. Laggard clubs are given special attention both by the district governor and Rotary International. If a local club persists in an unsatisfactory level of membership, attendance, or community service, efforts are made to secure the voluntary termination of its charter. In a few extreme cases, involuntary termination of a local club's charter has been necessary.

In addition to the foregoing principles of selectivity the constitution of Rotary International imposes on local Rotary clubs a membership restricted to "adult male persons". The rule had its origin many years ago in the quality of fellowship desired by Rotary's founders. However, as Rotary grew nationally and internationally, that membership policy grew into a fundamental and broadly accepted principle of Rotar-

ian operation, cherished not only for the quality of fellowship which it provided, but also to a material extent maintained because of the demonstrated fact that, as a "male-only" organization, Rotary had been able to operate effectively over a worldwide base of varied cultures and social mores.

In the last decade a number of proposals have been made to modify the restriction to allow more participation by women. In recent years, the only body authorized to amend Rotary International's constitution is the 400-man Council on Legislation which meets once every three years and is composed of democratically elected representatives from all of the diverse countries having local Rotary clubs. A vote of two-thirds of the delegates is required to approve an amendment. At both the 1977 meeting of the Council on Legislation in San Francisco, and at the 1980 Council on Legislation in Chicago several proposals to amend the "male-only" policy were debated and rejected. In 1980, 60 percent of the delegates voted against amending the membership restriction. The issue remains alive and vital and will be again debated at the 1983 Council on Legislation in Monaco.

It is clear that a ruling by this court, applying California law to California chapters of Rotary, allowing them to accept woman members contrary to the long standing and democratically reaffirmed membership principles of Rotary would comprise a material interference with deeply felt choices of associational preference of many Rotarians. The practical impact of such a ruling would materially affect the operation of Rotary not merely outside the State of California but outside the United States.

The Court accepts the testimony herein of Rotary's General Secretary that this issue is of widespread and deep concern among Rotarians both in the United States and in

widely different cultures throughout the world. The Court also accepts his testimony that the continued successful worldwide operation of Rotary is materially dependent on a delicate balance of divergent attitudes in diverse cultures, and that judicial interference with this balance, as reflected by the votes in Rotary's Council on Legislation, would risk a material and harmful disruption of the existing cooperative integrity of Rotary International both inside and outside the State of California.

Plaintiffs do not *directly* challenge the accuracy or merit of Rotary's concerns about the impact of interfering with its membership policy. Rather, they assert that there are countervailing economic interests of women in having access to Rotarians *within the ambit of Rotarian fellowship* for the purpose of acquiring "business contacts" which, they claim, cannot be achieved outside the limited confines of that fellowship. Ironically, this contention would have the Court nullify existing membership restrictions so that women could further violate Rotarian precepts by seeking commercial exploitation of Rotarian membership.

The Court finds that plaintiffs have not demonstrated that membership in the Duarte Club prior to its expulsion from Rotary comprised a substantial source of business contacts. In fact, Duarte was having difficulty attracting members. The Court further finds that the expulsion of Duarte from Rotary did not harm it as a vehicle for making business contacts. In fact the size of its membership and the vigor of its activities thereafter increased. The three female members of Duarte, *by their own admission*, did not join Duarte for professional benefits and disclaim any harm to their careers by reason of expulsion of Duarte by Rotary. The Court does not accept as true the speculation that at some time in the future their careers *might* suffer from Rotary's male-only policy. The Court is not persuaded by the evi-

dence introduced in this case that the "male-only" membership restriction of Rotary has deprived any woman of any material or substantial economic advantage. cf. Goodwin *Challenging The Private Club: Sex Discrimination Plaintiffs Barred At The Door*, 13 Southwestern Law Review 237 (1982). In this respect membership in Rotary is *not* equivalent to membership in certain professional societies. cf. *Pinsker v. Pacific Coast Society of Orthodontists*, 1 Cal. 3d 160, 165 (1969). Plaintiffs have expressly disclaimed monetary damages.

To force Rotary International by judicial intervention to permit local clubs in California to admit women members contrary to its democratically reaffirmed male-only membership policy would be inequitable. Without limiting the generality of the foregoing, such an injunction would create a substantial risk of irreparable harm to the national and international associational integrity of Rotary without conferring a commensurate or even a material economic, social or other benefit upon the plaintiff women in particular, or women in general.

In addition to the foregoing general findings, the court makes the following fact determinations of particular relevance to the issues raised by the pleadings. Preliminarily, it should be noted that plaintiffs disclaim reliance upon federal law and have used that disclaimer to defeat removal of this case to the federal courts. Rather, they limit their contentions to only three (3) principles of California law.

#### **The Unruh Act (Civil Code § 51)**

With respect to this contention, the Court finds that neither Rotary International, nor Rotary District 530 nor plaintiff Duarte are any of the following:

- (a) a business establishment of any kind whatsoever;



(b) an organization conducting a calling, occupation, or trade which its members engage in for the purpose of making a livelihood or gain. cf. *Burks v. Poppy Construction Co.*, 37 C. 2d 463, 468, (1982).

(c) an organization engaged in providing goods, services, and facilities to its members as clients, patrons, or customers, cf. *Alcorn v. Ambro Engineering, Inc.*, 2 Cal. 3d 493, 500 (1970). In this respect Rotary is materially different from the organizations described in *United States Jaycees v. McClure*, 305 N. W. 2d 764 (Minn., 1981) and *Wright v. Cork Club*, 315 F. Supp. 1143 (S. D. Tex., 1970).

(d) an organization formed or maintained for the protection or advancement of the business or professional interests of its members;

(e) an organization which encourages its members to do business with each other;

(f) an organization primarily engaged in for the purpose of obtaining business contacts for its members.

Moreover, to require Rotary International pursuant to the *Unruh Act* to offer its membership to women (as well as to the entire public indiscriminately) would inflict severe, irreparable, and unconscionable harm upon Rotary and the associational rights of its members without commensurate or any substantial resulting economic benefit to women or the public. To require Rotary International to permit its local clubs in California to offer individual membership to the general public would forcibly inject that general public into Rotarian activities outside California and outside the United States, contrary to existing Rotarian rules and regulations.



### **Article I, Section 8 of the California Constitution**

The Court finds that plaintiff Duarte and Rotary International are not government entities nor is there a nexus between the "male-only" membership policy of Rotary and any government entity, or action. Plaintiffs have disclaimed "government action".

No act of defendants has directly or indirectly disqualified or otherwise impeded any plaintiff or any woman from entering, or pursuing a business, profession, vocation, or employment because of sex.

### **The Estoppel Count**

The Court accepts as true the testimony of former District 530 governor Paul Bryan that during his visit in July 1977 he expressly advised Duarte that the Constitution of Rotary did not permit admission of women members, that he could not condone Ms. Bogart's membership, but that he would refrain from reporting to Rotary International the violation of Rotary's membership rules by Duarte on the understanding with Duarte that Donna Bogart's membership would be voluntarily terminated. Mr. Bryan neither advocated nor condoned the concealment of Ms. Bogart's identity from Rotary International by the use of the name "Don" or "D. Bogart" or otherwise.

At all relevant times plaintiffs knew that Mr. Bryan did not have actual or ostensible authority to permit Duarte to admit women members.

Duarte admitted women to membership in knowing violation of Rotary's membership restriction, in deliberate violation of the understanding reached with Mr. Bryan in July 1977, and is therefore guilty of unclean hands precluding injunctive relief.

No plaintiff was misled by any act of Mr. Bryan or Rotary District 530 or Rotary International. No plaintiff suffered a detriment by reason of any act of Mr. Bryan or Rotary District 530 or Rotary International.

Rotary was not estopped from enforcing the male only membership restriction in its constitution. It suspended Duarte only after a fair hearing, after full compliance with its internal rules of procedure, and after giving Duarte a fair opportunity to bring its membership in compliance with the male only restriction.

The Court reaches the following conclusions of law, together with any factual determinations implicit therein.

Neither plaintiff Duarte, Rotary International or Rotary District 530 are "business establishments" within the meaning of the California Unruh Civil Rights Act (Civil Code § 51). [*Burks, supra*, 37 C. 2d 463, 468 (1962)]. Membership in any of these organizations is not tantamount to being the "client, patron, or customer" of a business establishment [*Alcorn, supra*, 2 Cal. 3d 493, 500 (1970)].

The Court accepts the interpretation of legislative history reached by Professor Horowitz that would preclude application of the Unruh Act to "membership" in private organizations, particularly where, as here, that membership connotes substantial personal and social interactions with other members. See Horowitz, *The 1959 California Equal Rights In "Business Establishments" Statute—A Problem In Statutory Application*, 33 So. Cal.L.Rev. 261, 289-290 (1960).

The Court agrees with defendants' contention that the legislative history of the Unruh Act<sup>1</sup> implies a legislative intention to exclude

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<sup>1</sup> See Horowitz, *supra*, 33 So. Cal.L.Rev. 261, 265-270.

"membership in any and all business and professional organizations formed or maintained primarily for the protection or advancement of the business or professional interests of the members"

from the scope of

". . . accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever",

as the statute was finally enacted.

Moreover, as found above, the Court rejects plaintiffs' contention that the evidence of income tax deductions, payment of dues by employees, etc, connotes that Rotary is an organization having the business and professional interests of its members as a principal or material objective. Rather, the Court finds substantial similarity between Rotary and Kiwanis as described in *Kiwanis Club of Great Neck, v. Board of Trustees of Kiwanis International*, 374 NYS 2d 265 (1975), aff'd 383 NYW 2d 383 (1976), aff'd 41 NY 2d 1034(sic). This Court agrees with the conclusion of the New York court that

"The fact that individual members may use their membership in a club to further their own business interests does not, in any way, change the avowed purpose of the organization, or convert it into a commercial club." 374 NYS 2d at 268.

Moreover, even if Rotary were a commercial club explicitly rendering economic services to its members, that fact alone does not imply a duty under the Unruh Act or otherwise, to share those economic services indiscriminately with any member of the public who desires membership. Plaintiffs have conceded that the present case is closely similar to the New York Kiwanis case but contend that

under California law, the opposite result should obtain. The Court disagrees.

The "male only" membership policy of Rotary is not itself tantamount to the action of any government, nor is there a material "nexus" between any government action and the "male-only" membership restriction of Rotary, which is a private association of private local clubs. Article I, § 8 of the California Constitution has only been applied as a restriction on government action and thus is not applicable to Duarte, Rotary International, or Rotary District 530. *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 8-10 (1971).

Where, as here, there is no persuasive proof that exclusion from membership in the purely private organizations comprising Rotary has imposed a material or substantial economic constraint upon any woman, it would be a violation of defendants' rights to liberty of association under the United States Constitution for the California Courts or Legislature to require the defendant organizations to accept women in contradiction of the male only membership restrictions which have been frequently and recently reaffirmed democratically by the members of Rotary, *Healy v. James*, 408 U.S. 169 (1972); *Moose Lodge v. Iris*, 409 U.S. 163, 179-180 (Mr. Justice Douglas, dissenting) *Griswold v. Connecticut*, 361 U.S. 479, 483 n. 20 (1965); *Bell v. Maryland*, 378 U.S. 226, 313 (1964); *Gibson v. Florida etc.*, 372 U.S. 539, 543 (1963); *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958). See also 5 Witkin, *Summary of California Law*, Constitutional Law, §§ 165, 224.

Were the Unruh Act applicable to the membership policy of Rotary, it would not merely eliminate selectivity as to women; it would eliminate virtually any discretion in the selection of members. *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 730-736 (1982); *In re Cox*, 3 Cal. 3d 205, 216 (1970). The severe harm to Rotary caused by this latter

consequence is not balanced by any material economic benefit either to the public in general or to women in particular, would be inequitable and would therefore preclude the injunctive relief sought herein.

Plaintiffs have asked this California court to apply California law to an Illinois corporation administering a worldwide voluntary association of 20,000 local clubs comprise 1,000,000 men operating in substantial measure not merely outside California but also in diversity of 156 foreign cultures outside the United States. They ask this Court to force that association against its repeatedly expressed democratic preferences to accept not merely into its society, but to accept as *members* into its policy making councils a class of persons who, at least at the present time, are not freely welcome to a majority of that association's membership. There has been neither a showing or a claim that Illinois law has been violated, or have plaintiffs demonstrated any economic or other reasons why, under well-settled constitutional principles of interstate comity, the law of Illinois should not be the sole test of that corporation's internal membership rules. See generally 5 Witkin, *Summary of California Law*, Constitutional Law, § 289; *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 624 (1947). The Court concludes that these extra-territorial considerations alone are sufficient to decline granting the drastic injunctive relief sought by plaintiffs.

For the above reasons, judgment shall be entered in favor of the defendants and against the plaintiffs.

DATED: March 21, 1983.

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MAX F. DEUTZ  
Max F. Deutz,  
Judge of the Los Angeles  
County Superior Court

## **APPENDIX C**





CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FOUR

ROTARY CLUB OF DUARTE, et al.  
*Plaintiffs and Appellants,*

v.

BOARD OF DIRECTORS OF  
ROTARY INTERNATIONAL, et al.  
*Defendants and Respondents.*

No. B001663  
(Super. Ct. No.  
C244753)

ORDER MODI-  
FYING OPIN-  
ION AND  
DENYING  
REHEARING

THE COURT:

It is ordered that the opinion filed on March 17, 1986, be modified in the following particulars:

1. On page 18, the first sentence of the second full paragraph is deleted and the following is inserted in its place.

International is administered by the Board which consists of 17 members and which controls and manages the affairs and funds of International.

2. On page 42, the first 5 lines of the third full paragraph are deleted and the following is inserted in their place:

While the classification principle—i.e., membership criteria—established by International, and by which local clubs must abide, might at first blush appear to be selective, Rotary's own literature dispels this notion. Noting that the classification principle "would seem to

be a restrictive provision" International, through its literature, explains that *"its purpose is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross section of the business and professional life of the community."* (Rotary Basic Library, Focus on Rotary, vol. 1, p. 67; emphasis added.)

Additionally, the immense size of International and the number of Rotarians throughout the world is hardly indicative of an intimate relationship. While fellowship and service to the

3. On page 45, the last sentence of the second full paragraph is deleted and the following is inserted in its place:

It does not require International to change its objectives or to open membership to the entire public at large, nor does it invalidate its "inclusive, not exclusive," selective membership requirements.

(Rotary Basic Library, Focus on Rotary, vol. 1, p. 67.)

Respondents' petition for rehearing is denied.

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\*WOODS, P.J.

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McCLOSKEY, J.

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SHIMER, J.\*\*

\*\*Assigned by the Chairperson of the Judicial Council

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ROTARY CLUB OF DUARTE, et al.

*Plaintiffs and Appellants,*

v.

BOARD OF DIRECTORS OF  
ROTARY INTERNATIONAL, et al.

*Defendants and Respondents.*

No. B001663

(Super. Ct.  
No. C244753)

APPEAL from a judgment of the Superior Court of Los Angeles County. Max F. Deutz, Judge. Reversed.

ACLU Foundation of Southern California, Carol Agate, Sanford K. Smith and Fred Okrand, for Plaintiffs and Appellants.

Women Lawyers' Association of Los Angeles, Carol S. Boyk, Evelyn Balderman Hutt, Lorraine L. Loder, Susan Schwartz, and Blanch Bersch as Amicus Curiae on behalf of Plaintiffs and Appellants.

Darling, Hall & Rae and Wm. John Kennedy, for Defendants and Respondents.

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Incredibly, 14 years before the start of the 21st century and 210 years after the signing of the Declaration of Inde-

pendence we still find ourselves having to write an opinion defending the right of American women to equal opportunity in a secular organization of approximately 20,000 clubs with more than 900,000 members.

Specifically, we are called upon to decide whether the Board of Directors of Rotary International (Board) may lawfully revoke the charter of the Rotary Club of Duarte (Duarte) and terminate its membership in Rotary International (International) because Duarte admitted women into its club.

To do this we must decide whether the male-only-membership policy of International violates the Unruh Civil Rights Act (Unruh Act) (Civ. Code, § 51).<sup>1</sup> Also presented for resolution in this case is the question of whether International's policy of excluding women from club membership violates article 1, section 8 of the California Constitution.<sup>2</sup>

International, a non-profit organization incorporated in the State of Illinois, is the association of local Rotary clubs

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<sup>1</sup> Civil Code section 51 provides: "This section shall be known, and may be cited, as the Unruh Civil Rights Act. [¶] All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. [¶] This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin."

<sup>2</sup> Article 1, section 8 of the California Constitution provides: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

worldwide. Each individual Rotarian is a member of his local club, not of International. These local clubs are, in turn, members of International which is headquartered in Evanston, Illinois. In August 1982, approximately 19,788 local clubs existed throughout the world. Membership in these clubs totaled approximately 907,750 men.

International defines Rotary as "an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." (1981 Manual of Proc., p. 7; 1978 Manual of Proc., p. 7.)<sup>3</sup>

The purpose of International are "[t]o encourage, promote, extend and supervise Rotary throughout the world" and "[t]o co-ordinate and generally direct the activities of Rotary International." (Art. II of the International Const., 1981 Manual of Proc., p. 239, 1978 Manual of Proc., p. 241.)

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<sup>3</sup> On our own motion we have augmented the record on appeal to include the Los Angeles Superior Court file pursuant to California Rules of Court, rule 12(a).

Pursuant to a written "Stipulation Regarding Certain Undisputed Facts and Related Portions of the Record" certain documentary evidence including International's 1975, 1978, and 1981 manuals of procedure, the deposition of Herbert A. Pigman, General Secretary of International, the seven volume "Rotary Basic Library" and International publication No. 501 was admitted into evidence.

International's manual of procedure is the authoritative statement of Rotary practices and principles. It is updated and reprinted every three years after the meeting of the Council on Legislation. The Council on Legislation meets triennially and constitutes the legislative body of International. (Art. VIII, § 6 of the International Const., 1981 Manual of Proc., pp. 241-242, 1978 Manual of Proc., p.244.)



Membership in local Rotary clubs is limited to men. (Art. IV, § 3 of the International Const., 1981 Manual of Proc., pp. 239-240, 1978 Manual of Proc., pp. 241-242; art. II of Bylaws of International, 1981 Manual of Proc., p. 249, 1978 Manual of Proc., p. 251; art. V of the Club Const., 1981 Manual of Proc., p. 303, 1978 Manual of Proc., p. 305.) The "classification principle" utilized by International, with certain exceptions, limits the number of members from each classification of business or profession within the community that can be admitted into active membership in a local Rotary club.<sup>4</sup>

Each club that is admitted to membership by International and which accepts the certificate of membership

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<sup>4</sup> Section 3 of article IV of the International Constitution which is entitled "Membership" provides:

"Section 3—*Composition of Clubs*. [§](a) A Rotary club shall be composed of men with the qualifications hereinafter provided and no club shall be qualified for membership in Rotary International unless the qualifications of its active members are as follows: [§] They are adult male persons of good character and good business or professional reputation, and [§] (1) engaged as proprietor, partner, corporate officer, or manager of any worthy and recognized business or profession; or [§] (2) holding an important position in an executive capacity with discretionary authority in any worthy and recognized business or profession; or [§] (3) acting as the local agent or branch representative of any worthy and recognized business or profession having charge of such agency or branch in an executive capacity; and [§] personally and actively engaged in the respective businesses or professions in which they are classified in the club and having their places of business or residence located within the territorial limits of the club. [§] In the event an active member of a club, after having an active membership in one or more clubs for five or more years, ceases to have his place of business or residence

"accepts, ratifies and agrees to be bound in all things, not contrary to law, by [the] constitution and the by-laws of Rotary International, and amendments thereto and to faithfully observe the provisions thereof." (Art. IV, § 4 of the International Const., 1981 Manual of Proc., p. 240; 1978 Manual of Proc., P. 242.)

Duarte is located in Rotary District 530. Rotary districts are geographical territories in which adjacent local Rotary clubs are grouped for administrative reasons of International. Each district has a district governor who acts as International's representative in the field. (Rotary Basic Library, Focus on Rotary, vol. 1, p. 81.)

In 1977, Duarte admitted Donna Bogart, Mary Lou Elliot, and Rosemary Freitag as active regular members of Duarte in contravention of the constitution and bylaws of International. Duarte had been experiencing membership problems and decided that its membership growth goals

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within the territorial limits of the club, he may retain his membership in the club provided his new place of business or residence is located within the corporate limits of the city in which the club is located or within the territorial limits of an immediately adjoining club.

"(b) There shall be not more than one active member in each classification of business or profession, excepting the religion, news media and diplomatic service classifications, and excepting the provision for additional active members as provided in the by-laws.

"(c) The by-laws of Rotary International may provide for kinds of membership in addition to active membership in Rotary clubs to be designated as senior active, past service, and honorary membership and shall prescribe the qualifications for each." (1978 Manual of Proc., pp. 241-242; see also 1981 Manual of Proc., pp. 239-240.)

could best be reached by allowing qualified women to join it as it believed that in its small community there were more women than men leaders in the business and professional sector.

After complying with its own notice and hearing requirements, International, acting through its Board, revoked Duarte's charter and terminated its membership in International.

On January 8, 1979, Duarte, Elliott and Freitag filed an amended complaint for injunctive and declaratory relief against the Board, Rotary District 530, Paul G. Bryan, the district governor for Rotary District 530 for the 1977-78 fiscal year, Oliver Batcheller, the district governor for Rotary District 530 for the 1978-79 fiscal year, and numerous Doe defendants.<sup>5</sup>

In their amended complaint, plaintiffs sought (1) to enjoin the defendants from declaring Duarte's charter null and void, from compelling delivery of the charter to any representative of International, and from enforcing those provisions of the International constitution and by-laws restricting membership in local clubs to men and (2) a declaration that the acts of defendants violated the Unruh Act and article 1, section 8 of the California Constitution.

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<sup>5</sup> While Bogart was named as a party plaintiff in the original complaint for declaratory relief filed on June 20, 1978, she was not named as a party plaintiff in the amended complaint and is not a party to this appeal.

On May 2, 1982, at plaintiffs' request, the entire action as to defendant Oliver Batcheller was dismissed with prejudice.

On December 3, 1982, Paul Bryan was dismissed as a defendant pursuant to stipulation of counsel.

The matter was tried before the court sitting without a jury. On March 21, 1983, judgment was entered in favor of defendants and against plaintiffs. Concurrently with the filing of the judgment, the trial court filed a statement of decision as requested by plaintiffs pursuant to Code of Civil Procedure section 632.

In denying plaintiffs' requests for injunctive and declaratory relief the trial court found that International, Duarte, and Rotary District 530 are not "business establishments" within the meaning of the Unruh Act or organizations providing "goods, services and facilities" to its members. The trial court further found that to preclude the enforcement of International's male-only-membership policy in California would infringe upon the associational rights of many Rotarians and "would materially affect the operation of Rotary not merely outside the State of California but outside the United States." The trial court also found that plaintiffs failed to demonstrate that enforcement of the male-only-membership policy and expulsion of Duarte from International caused any damage to Duarte or to the individual plaintiffs or to women in general.

With respect to the constitutional claim of Freitag and Elliot, the trial court found that there was no nexus between International's male-only-membership policy and government action, that plaintiffs had made no claim of government action, and that "[n]o act of defendants has directly or indirectly disqualified or otherwise impeded any plaintiff or any woman from entering, or pursuing a business, profession, vocation, or employment because of sex."

## DISCUSSION

## I

The Unruh Act is to be liberally construed with a view to effectuating the purposes for which it was enacted and to promote justice. (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28; *Winchell v. English* (1976) 62 Cal.App.3d 125, 128.) "As with all statutes, it must be construed in the light of the legislative purpose and design. In enforcing the command of a statute both the policy expressed in its terms, and the object implicit in its history and background, should be recognized." (*Winchell v. English, supra*, 62 Cal.App.3d at p. 128.)

One of the policies underlying the enactment of the Unruh Act is the eradication of discrimination by private or public action on the basis of sex by "business establishments in the furnishing of "accommodations, advantages, facilities, privileges, or services." (§ 51; *Koire v. Metro Car Wash, supra*, 40 Cal.3d at p. 36; *Winchell v. English, supra*, 62 Cal.App.3d at p. 128.) The Unruh Act is clearly a declaration of California's public policy mandate and objective that men and women be treated equally. (*Koire v. Metro Car Wash, supra*, 40 Cal.3d at p. 37.)

"[B]oth its history and its language disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise. That the act specifies particular kinds of discrimination—[sex], color, race, religion, ancestry, and national origin—serves as illustrative, rather than restrictive, indicia of the type of conduct condemned." (*In re Cox* (1970) 3 Cal.3d 205, 212.)

The Unruh Act, enacted into law in 1959, emanated from and was modeled after traditional public accommodations legislation. It "expanded the reach of such statutes from common carriers and places of public accommodation and

recreation, e.g., railroads, hotels, restaurants, theaters and the like, to include 'all business establishments of every kind whatsoever.' [Citation.]" (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 731, cert. den., 459 U.S. 858.) Today, it provides in pertinent part that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in *all business establishments of every kind whatsoever.*" (Emphasis added.)

In *O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795, this state's highest court quoting from *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 468-469, noted that "'[t]he Legislature used the words 'all' and 'of every kind whatsoever' in referring to business establishments covered by the Unruh Act (Civ. Code, § 51), and the inclusion of these words without exception and without specification of particular kinds of enterprises, leaves no doubt that the term 'business establishments' was used in the broadest sense reasonably possible. The word 'business' embraces everything about which one can be employed, and it is often synonymous with 'calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain.' [Citations.] The word 'establishment' as broadly defined, includes not only a fixed location, such as the 'place where one is permanently fixed for residence or business,' but also a permanent 'commercial force or organization' or 'a permanent settled position (as in life or business).'" [Citation.]"

The *Burks* court concluded that a real estate developer engaged in the business of developing and building tract houses which were offered for sale to the public through advertisements and the display of a model home operated a business establishment within the meaning of the Unruh



Act. In reaching this conclusion, the *Burks* court noted that “[t]he original version of the bill which was presented to the Legislature, in addition to affording protection in ‘business establishments,’ referred specifically to the right ‘to purchase real property’ and to other rights, such as the obtaining of ‘professional’ services.” (57 Cal.2d at p. 469.) Then in noting that the final version of the Unruh Act as enacted into law eliminated these specific references, the *Burks* court concluded that the “deletions can be explained on the ground that the Legislature deems specific references mere surplusage, unnecessary in view of the broad language of the act as finally passed.” (*Ibid.*)<sup>6</sup>

Eleven years later in *O'Connor*, the Supreme Court reaffirmed its reasoning in *Burks* stating: “The broadened scope of business establishments in the final version of the bill, in our view, is indicative of an intent by the Legislature to include therein all formerly specified private and public groups or organizations that may reasonably be found to constitute ‘business establishments of every type whatsoever.’ . . . Nothing in the language or history of its enactment calls for excluding an organization from its scope simply because it is nonprofit. [Citation.]” (33 Cal.3d at pp. 795-796.)

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<sup>6</sup> On January 21, 1959, the Unruh Act was introduced to the Legislature as Assembly Bill 594. The original version of that bill in pertinent part provided: “All citizens within the jurisdiction of this State, *no matter what their race, color, religion, ancestry, or national origin*, are entitled to the full and equal *admittance, accommodations, advantages, facilities, membership, and privileges in, or accorded by, all public or private groups, organizations, associations, business establishments, schools, and public facilities; to purchase real property; and to obtain the services of any professional person, group or association.*” (Emphasis in original.)

The *O'Connor* court then went on to conclude that a nonprofit homeowners' association of a condominium development violated the Unruh Act when it attempted to enforce an arbitrary age restriction in the covenants, conditions and restrictions of the development. In concluding that the nonprofit homeowners' association was a business establishment within the meaning of the Unruh Act, the court stated:

"The Village Green Owners Association has *sufficient businesslike attributes* to fall within the scope of the act's reference to 'business establishments of every kind whatsoever.' Contrary to the association's attempt to characterize itself as but an organization that 'mows lawns' for owners, the association in reality has a far broader and more businesslike purpose. The association, through a board of directors, is charged with employing a professional property management firm, with obtaining insurance for the benefit of all owners and with maintaining and repairing all common areas and facilities of the 629-unit project. It is also charged with establishing and collecting assessments from all owners to pay for its undertakings and with adopting and enforcing rules and regulations for the common good. In brief, the association performs all the customary business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders. A theme running throughout the description of the association's powers and duties is that its overall function is to protect and enhance the project's economic value. Consistent with the Legislature's intent to use the term 'business establishments' in the broadest sense reasonably possible [citation], we conclude that the Village Green Owners Association is a business establishment within the meaning of the act." (*O'Connor v. Village Green Owners Assn.*, *supra*, 33 Cal.3d at p. 796; emphasis added.)

In *Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712, appeal dismissed (1984) U.S. [82 L.Ed.2d 873, 104 S.Ct. 3574], Division Seven of this court reversed the judgment of dismissal entered in favor of defendant Boy Scouts after the trial court sustained its demurrer without leave to amend on the ground that plaintiff Curran had failed to state facts constituting a violation of the Unruh Act. (*Id.*, at pp. 734-735.) The *Curran* court concluded that plaintiff's complaint contained allegations showing that the Boy Scouts has certain "businesslike attributes"<sup>7</sup> and hence is a business establishment prohibited from arbitrarily discriminating against homosexuals in the provision of its services. (*Id.*, at p. 730.) In light of plaintiff's further allegation that he had been expelled and excluded from the Boy Scouts organization because he was a homosexual (*Id.*, p. 718), the *Curran* court, concluded that because "the Unruh Act prohibits arbitrary discrimination against homosexuals" (*Id.*, at p. 734), plaintiff had in fact sufficiently pleaded a cause of action for violation of the Unruh Act. (*Ibid.*)

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<sup>7</sup> In its factual statement, the *Curran* court stated that plaintiff in his complaint alleged, among other things, "that the Boy Scouts of America is the owner of the copyright of the Boy Scouts' emblem and uniform, which are franchised to retail outlets throughout the United States. It derives great financial revenues from such franchising. In addition, the Boy Scouts of America is engaged in the book publishing business and publishes and sells a variety of books throughout the United States. Furthermore, defendant maintains a retail shop in Walnut Creek, California, where it engages in extensive commercial activities." (147 Cal.App.3d at p. 719.)

In *Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, mod. 40 Cal.3d 585a, the Supreme Court after noting that the phrase "business establishments" includes "at least those facilities subject to the predecessor statute—i.e., 'place of public accommodation or amusement'" (*Id.*, at p. 79) concluded that the Boys' Club of Santa Cruz, Inc. (Boys' Club) is a "'place of public accommodation or amusement' and thus a 'business establishment' covered by the Act." (*Id.*, at p. 81.) The court further concluded that in the absence of evidence demonstrating a social need for the exclusion of girls from the facility, exclusion of local girls from membership in the Boys' Club was an arbitrary form of discrimination. (*Id.*, at pp. 88-90.)

In concluding that the Boys' Club is a "place of public accommodation or amusement" the *Isbister* court explained: "The Club certainly qualifies as a 'place of amusement.' Indeed, its primary function is to operate a permanent physical plant offering established recreational facilities which patrons may use at their convenience during the hours the Club is open. [¶] Moreover, the Club is classically 'public' in its operation. It opens its recreational doors to the entire youthful population of Santa Cruz, with the sole condition that its users be male." (40 Cal.3d at p. 81.)

The *Isbister* court also noted that the nonprofit organization had some "businesslike attributes," and explained that "like the nonprofit hospital . . . cited [in *O'Connor*] as an example of a nonprofit 'business establishment,' the Club employs a substantial paid staff and 'care[s] for an extensive physical plant' used for public purposes. [Citation.] [¶] . . . In these circumstances, the fact that its purposes and operations are not strictly commercial does not bar a conclusion that it is a 'business establishment' to which the Act applies." (40 Cal.3d at pp. 82-83; fns. omitted.)

With these legal principles in mind, we proceed to decide whether International is a business establishment. The resolution of this issue is one of law.<sup>8</sup>

## II

In the case before us, the trial court specifically found that International, Rotary District 530 and Duarte were not business establishments with the meaning of the Unruh Act.

The question pivotal to this appeal is whether International is a business establishment, for it was this worldwide organization that discriminated against Duarte and its female members by revoking Duarte's charter and terminating its membership in International.

In resolving this issue, however, we must also examine the function and activities of Duarte and local clubs since these are dictated by International.

## A

As stated earlier, International is a worldwide nonprofit corporate association of local Rotary clubs. It is permanently headquartered at the International headquarters building in Evanston, Illinois.

International's status as a nonprofit organization, does not preclude it from being a business establishment within the meaning of the Unruh Act. As the court in *O'Conner* stated, "Nothing in the language or history of its enactment calls for excluding an organization from its scope simply because

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<sup>8</sup>We note that at the time judgment was rendered below the trial court did not have the advantage, as we do, of the subsequently decided important cases of *O'Connor*, *Koire*, *Isbister* and *Curran*.

it is nonprofit. [Citation.] Indeed, hospitals are often nonprofit organizations, and they are clearly business establishments to the extent that they employ a vast array of persons, care for an extensive physical plant and charge substantial fees to those who use the facilities." (33 Cal.3d at p. 796.)

Like the homeowners' association in *O'Connor*, International "in reality has a far broader and more businesslike purpose." (*O'Connor v. Village Green Owners Assn.*, *supra*, 33 Cal.3d at p. 796.) Its businesslike attributes are readily apparent from a brief overview of its organizational structure as well as certain of its administrative and financial concerns.

International is administered by the Board which consists of 17 members which controls and manages the affairs and funds of International. (Art. V, §§ 1 and 2 of the International Const., 1981 Manual of Proc., p. 240, 1978 Manual of Proc., p. 242.) The Officers of the organization are the "president, vice-president, other directors, general secretary, treasurer, district governors, and the president, immediate past president, vice president and honorary treasurer of Rotary International in Great Britain and Ireland." (Art. VI, § 1 of the International Const., 1981 Manual of Proc., p. 240, 1978 Manual of Proc., p. 242.)

International's principal sources of revenue "are per capita dues from clubs; convention and regional conference registration fees; charter fees from new clubs; sale of publications; subscriptions and advertising income from the magazine; license fees and royalty payments; and interest and dividends on investments." (1981 Manual of Proc., p. 104; 1978 Manual of Proc., p. 104.)

Members of the Board, committee chairpersons and other authorized persons are reimbursed by International for expenses incurred in furthering specified International busi-



ness and responsibilities. (1981 Manual of Proc., pp. 105-108; 1978 Manual of Proc., pp. 105-108.) Total reimbursement made to each District governor may not exceed the total amount of his budget appropriation. (1981 Manual of Proc., p. 106; 1978 Manual of Proc., p. 106.)

The general secretary of International is the managing officer of the organization and is its most senior full-time employee. The general secretary, together with an international staff of 350 individuals, constitutes the secretariat of International. The secretariat operates from what is known as the "Central Office" located in Evanston, Illinois and from branch offices in Switzerland, Sweden, Australia, Sao Paulo, and Japan. Rotary literature describes the secretariat "as a 'clearinghouse' for Rotary clubs worldwide, gathering, analyzing, translating, and disseminating Rotary information . . . [which] serves the officers and members of Rotary clubs, the R.I. Board of Directors, the committees, and district governors." (Rotary Basic Library, Focus on Rotary, vol. 1, p. 51.)

The Central Office is organized into six divisions. Rotary literature describes each of these six divisions as follows:

"1. *Administrative Services*, which serves the R.I. Board of Directors, implements legislative and other special procedures, and provides travel service for Rotary officers, committees, and personnel.

"2. *Communications*, which publishes the official magazine, assists the regional magazines, produces R.I. literature and audiovisual programs, and coordinates public relations, printing, and graphic arts operations.

"3. *Finance*, which supervises the fiscal operations of R.I. and The Rotary Foundation<sup>9</sup> throughout the world.

"4. *Personnel and Office Services*, which administers personnel procedures and staff development, and provides secretarial, office, translation, and printing and duplicating services.

"5. *Program Development*, which develops and implements R. I. programs, plans and manages R. I. annual conventions and other international meetings, and coordinates research activities.

"6. *Service*, which promotes Rotary programs, membership growth, and provides service to district governors and Rotary clubs worldwide." (Rotary Basic Library, Focus on Rotary, vol. 1, pp. 52-54.)

Also part of the secretariat organization is the Finance and Investment Administrator who oversees all financial operations of International including investments. The Finance Committee of International "develops and recommends a budget to the R. I. Board of Directors. When adopted, the budget appropriations govern expenditures. A standing committee advises the Board on all investment matters and monitors the performance of professional investment managers." (Rotary Basic Library, Focus on Rotary, vol. 1, p. 56.)

"The expense of the secretariat in Evanston, Illinois, U.S.A., and branch offices covers such items as the salaries of the employees, operating expenses of R. I. headquarters building in Evanston, and rental of branch office space, stationery, supplies, postage, express, telegraph and telephone, electronic data processing, multi-copying, printing,

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<sup>9</sup> Rotary Foundation is a trust operated under the laws of the State of Illinois. (1981 Manual of Proc., p. 208; 1978 Manual of Proc., p. 213.)

pamphlets distributed gratis, furniture and equipment depreciation and repairs, insurance and taxes, auditing, general expense, etc." (1981 Manual of Proc., p. 108; 1978 Manual of Proc., p. 108.)

While the organizational structure and financial concerns of International are much more extensive and complex, this brief overview clearly establishes that International is an organization which exhibits substantial businesslike attributes.

International is an organization with permanent offices throughout the world. It utilizes vast numbers of staff to manage, supervise, coordinate and direct its activities. As of 1982, it was the parent organization for approximately 19,800 member clubs as well as the guiding force for more than 900,000 Rotarians. The divisions of the secretariat's central office each play a major and critical part in the administration of the organization and are clearly reflective of a businesslike hierarchy.

Commercial attributes and advantages, too, become obvious when the functions and responsibilities of the communications division of the secretariat are scrutinized. Said division is described in Rotary literature as a "publishing house" which produces and revises a wide range of Rotary books, manuals, pamphlets, and periodicals. Many publications and resource materials are issued in a number of different languages. Additionally the communications division "plays a vital role in preparing Rotary publications and audiovisual and public relations material for distribution to clubs, districts, and a worldwide membership." (Rotary Basic Library, Focus on Rotary, vol. 1, p. 60.)

One of the specific functions of the communications division is the publication of the official magazine of Rotary which is received by nearly one-half million readers and is

read by Rotarians and non-Rotarians alike. The Rotarian is published monthly in English and the Revista Rotaria is published bi-monthly in Spanish. (Rotary Basic Library, Focus on Rotary, vol. 1, p. 61.)

In the United States and Canada, membership in International is conditioned upon the active, senior active, and past service members of local clubs becoming and remaining paid subscribers to the Rotarian. For clubs outside the United States and Canada, membership in International, too, is conditioned upon their members subscribing to the Rotarian or an approved regional Rotary magazine. Compliance with the condition may be excused under certain circumstances. Subscription to the Revista Rotaria is mandatory for all members of local clubs in Spanish-speaking countries. (Art. XVIII of International Bylaws, 1981 Manual of Proc., pp. 296-297, see also pp. 104-105; art. XIX of International Bylaws, 1978 Manual of Proc., pp. 297-298, see also pp. 104-105.)

Commercial aspects are also apparent in the manner in which International grants authorization to use the Rotary emblem.

In response to various concerns and individuals who requested permission from International to manufacture and sell articles bearing the emblem of the Rotary, the Board "agreed to the establishment of a license fee and royalty procedure for the authorization of firms and individuals to manufacture, sell or use the Rotary emblem. [¶] The board authorized and instructed the general secretary to develop such a license fee and royalty procedure, including a form of agreement and license, such procedure to provide that, in consideration of authorization granted by R.I. to firms and individuals to manufacture, sell or use the Rotary emblem or items bearing the Rotary emblem, such firms and individuals shall be required to pay to R.I. a license fee and an

annual royalty on the annual gross sales of Rotary emblem merchandise." (1981 Manual of Proc., p. 150; 1978 Manual of Proc., p. 152.)

Each year International publishes an official directory "containing a list of all the clubs, the names and addresses of their presidents and secretaries, time and place of meetings, names and addresses of the officers and committeemen of R.I., and other information appropriate to such a publication." (1981 Manual of Proc., p. 171; 1978 Manual of Proc., p. 175.) While the manual of procedure purports to prescribe the use by a Rotarian of the official directory for commercial reasons, part of the official directory, "is a hotel directory carrying the advertising cards of a partial list of hotels which are owned or operated by Rotarians or which are meeting places or headquarters of Rotary clubs." The directory also includes "a list of those firms which have been licensed by R.I. to manufacture and/or sell specifically approved items being the Rotary, Rotaract or Interact name and emblem." (1981 Manual of Proc., p. 171; 1978 Manual of Proc., p. 175.)

The commercial benefits engendered by the advertisement section of the official directory are obvious. We conclude, therefore, that although International is a nonprofit organization it has sufficient businesslike attributes to render it a business establishment under the Unruh Act.

## B

There is no doubt that there are substantial business benefits to be gained by belonging to an organization such as Rotary which is comprised of community business and professional leaders. As a matter of fact, the trial court recognized that such benefits derived from membership in Rotary but found them to be "incidental to the principal

purposes of the association which are to promote fellowship for *non-commercial*, and *non-economic* objectives and to secure the voluntary uncompensated participation of business and professional men" in services and activities performed on a local, national and international level. (Emphasis in original.)

The trial court, however, mistakenly discounted the significance of these benefits. Substantial business benefits regardless of whether they are of a primary or secondary concern must be considered when deciding whether an organization is bound by the Unruh Act.

Volume 1 of the Rotary Basic Library, Focus on Rotary, makes clear that the primary purpose for the formation of the Rotary movement was commercial advantage. (P. 5.)

From a discussion held among four men "came the idea of a men's club whose membership would be limited to one representative from each business and profession. Weekly meetings were to be held at each member's place of business in turn. The rotation of meetings was designed to acquaint the members with one another's vocations and to promote business."

"The earliest meetings of the 'Rotarians' were held in the name of 'acquaintance' and good fellowship, and they were designed to produce increased business for each member." (Rotary Basic Library, Focus on Rotary, vol. 1, p. 2.) The men who joined were "motivated primarily by the business they expected to receive from other club members . . . . (Rotary Basic Library, Vocational Service, vol. 3, pp. 6-7.)

Further, Rotary's literature itself makes clear that "Rotary derives its name from the historic fact that the first Rotary club in Chicago rotated its meeting site to a different member's place of business each week, thus underscoring



the vocational foundation of its philosophy." (See International publication No. 501.)

The trial court found that the classification principle of selecting one representative from each business and profession "originated many years ago from self-seeking commercial purposes" but that the Rotary has for many years abandoned the use of the classification principle "as a device for encouraging preferential business relationships among Rotarians." We note, however, that the classification principle still exists in Rotary, and that International now states that "[t]he purpose of this 'classification' system is to ensure that the members of each club comprise a true cross-section of their community's business and professional life or endeavor." (Rotary Basic Library, Focus on Rotary, vol. 1, p. 2.)

Rotary literature states that as the organization grew, its founders began to realize that fellowship for commercial advantage and business reciprocity was not the foundation upon which the organization could endure. (Rotary Basic Library, Focus on Rotary, vol. 1, p. 2; Community Service, vol. 4, p. 3.) Accordingly, Rotary "deepened its purpose and developed its ideal of 'Service Above Self,' which it expects its members to carry into the marketplace, the office and factory, the community at large and into other lands." (Rotary Basic Library, Focus on Rotary, vol. 1, p. 2.)

Today, official policy promulgated by International through its Board "specifically prohibits any attempt to use the privilege of membership for commercial advantage." (Rotary Basic Library, Focus on Rotary, vol. 1, p. 2.) The mere fact, however, that the use of Rotary membership for commercial gain is proscribed in a written policy statement promulgated by the Board does not mean that commercial advantages and business benefits have in actuality ceased to flow from Rotary membership or that they are not signifi-

cant motivating forces in joining local clubs. Accordingly, the value and import of the written policy, if any, can only be ascertained by measuring compliance with this proscription.

That Rotarians consider membership in a local club to have a relation to business is established by the evidence presented below. Richard Key who was the president of Duarte at the time it was ousted from International testified that he was an assistant school superintendent and that he joined Duarte because all the superintendents he knows belong to Rotary clubs and benefited by becoming acquainted with business and industrial leaders in the community. He pays for his dues personally and then deducts them as a business expense on his tax forms. He remembered that one year he was audited, but the deduction of his Rotary dues was allowed.

William Brooks worked at the City of Hope Medical Center. He testified that he joined Duarte because the administration of the City of Hope Medical Center felt that its organization should be represented in a service club. He testified that his dues were paid by the City of Hope and that he took expenses related to his membership in Duarte as a business expense.

Kenneth Caresio, the city manager of Duarte, in testifying expressed his reasons for joining Duarte as follows: "I felt that professionally it would give me the opportunity to meet with the business community both of our city as well at the business community in the adjacent area." He further testified that at the time he joined "the city was pushing very hard for economic development and we felt that it would help out the city." Mr. Caresio also testified that his predecessor was a member of Duarte and that city managers belonged to local Rotary clubs. He candidly stated that "it

seems to be an unwritten tradition that city managers join the Rotary clubs." His dues were paid by the city.

Herbert Pigman, the general secretary of International, in his deposition; too, testified that it was a condition of his employment in International that he be a member of a Rotary club and that he deducted his dues to the Evanston Rotary Club to which he is a member as a business expense.

Dr. Jacob Frankel testified by stipulation that he is the president of California State College, Bakersfield and a member of the Rotary Club of Bakersfield. It was his belief that Rotary membership was essential for a college president to raise funds. All members of his cabinet are members of various local Rotary clubs and were encouraged to join as part of their employment. A former treasurer of the Bakersfield Rotary, Dr. Frankel noted that out of the club's 200 members only 8 or 10 paid their dues personally. The dues of all other members were paid by their companies or businesses.

This evidence leaves no doubt that business concerns are a motivating factor in joining local clubs. While Rotarians perform numerous and commendable charitable services at the local, national and international levels, the evidence establishes that there are business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers.

The evidence simply does not support the trial court's finding that these business advantages are merely incidental. By limiting membership in local clubs to business and professional leaders in the community, International has in effect provided a forum which encourages business relations to grow and which enhances the commercial advantages of its members.

We therefore conclude that Duarte, too, is a business establishment within the meaning of the Unruh Act.

### III

Underlying the trial court's finding and conclusion that neither International nor Duarte is a business establishment is its finding that these organizations are private and hence not governed by the Unruh Act.

Relying on Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute—A Problem in Statutory Application* (1960) 33 So. Cal. L. Rev. 260, 281, 289-290, the trial court concluded that the legislative history of the Unruh Act precludes its application to membership "in private organizations, particularly where, as here, that membership connotes substantial personal and social interactions with other members." We believe that conclusion of the trial court was erroneous.

While the Supreme Court in *O'Connor* made it clear that "[t]he broadened scope of business establishments in the final version of the bill . . . is indicative of an intent by the Legislature to include therein all formerly specified *private* and public groups or *organizations* that may reasonably be found to constitute 'business establishments' of every type whatsoever" (33 Cal.3d at pp. 795-796, emphasis added), that court in *Isbister* declared that the Unruh Act "does not govern relationships which are truly private." (40 Cal.3d at p. 84; fn. 14.) It described "truly private" relationships as "'continuous, personal, and social'" and which "take place more or less outside 'public view.'" (*Ibid.*, citing Horowitz, *supra*, 33 So. Cal. L. Rev., at pp. 281, 287, 289.)

Membership in International is far from "continuous, personal and social." International's membership consists of at least 19,800 separate local Rotary clubs and is non-

gratuitous. Individual Rotarians are not members of International yet they are compelled to "make up" meetings they have missed at Rotary clubs elsewhere where they are not members. In fact, International is more of an organizational director, regulator and supervisor. A local Rotary club can be formed only upon the approval of International. All of its members must abide by the rules set forth by International in its constitution and by-laws. Failure of a local club to comply with said rules could result in the revocation of its charter. Additionally, as found by the trial court, "[i]f a local club persists in an unsatisfactory level of membership, attendance, or community service, efforts are made to secure the voluntary termination of its charter." Involuntary termination of a club's charter is determined by International to become necessary at times.

With respect to local clubs, the community services performed by local Rotarians clearly take place in "public view." This is also true of most of the activities of District and International. In fact, Rotary literature states that "[e]very Rotary club must have its windows and doors open to the whole world." (Rotary Basic Library, Focus on Rotary, vol. 1, p. 69.)

While there is personal and social interaction among Rotarians, the commercial aspects of the relationship clearly preclude a conclusion that they are "truly private." Additionally, Paul Bryan, a former district governor of Rotary District 530, testified that turnover is high in local clubs. He stated that in many clubs the turnover is about 10 percent a year and that turnover is as high as 20 percent in larger clubs. The relationship among Rotarians is not "continuous, personal and social." We conclude therefore that the trial court's finding and conclusion that International and Duarte were "private" organizations immune from the re-

medial grasp of the Unruh Act is not supported by substantial evidence.

#### IV

As "business establishments," International and Duarte are prohibited from arbitrarily discriminating in the provision of its "accommodations, advantages, facilities, privileges, or services." (§ 51.)

Because we conclude that membership in an organization constituting a business establishment is clearly an "advantage" or "privilege" under the Unruh Act, exclusion from or termination of membership arbitrarily on the basis of sex is prohibited.

Additionally, a variety of goods, privileges and services flow from membership in a local Rotary club. These include the official Rotary magazine, numerous Rotary publications, the right to wear or display the Rotary emblem and to attend "business relation conferences" wherein the Rotarian "learns management techniques that help improve his own business or professional skills" and "receives the inspiration of discussing business problems with experts in his own or related fields."

The trial court's finding that neither International nor Duarte is "an organization engaged in providing goods, services, and facilities" is therefore unsupported by substantial evidence in the record on appeal.

#### V

We next address the trial court's finding that "[t]o force Rotary International by judicial intervention to permit local clubs in California to admit women members contrary to its democratically reaffirmed male-only membership policy



would be inequitable" because "such an injunction would create a substantial risk of irreparable harm to the national and international associational integrity of Rotary without conferring a commensurate or even a material economic, social or other benefit upon the plaintiff women in particular, or women in general."

### A

In finding that a ruling prohibiting International from enforcing its male-only-membership restriction "would comprise a material interference with deeply felt choices of associational preference of many Rotarians" and "would materially affect the operation of Rotary not merely outside the State of California but outside the United States," the trial court stated:

"The Court accepts the testimony herein of Rotary's General Secretary [Mr. Pigman] that this issue is of widespread and deep concern among Rotarians both in the United States and in widely different cultures throughout the world. The Court also accepts his testimony that the continued successful worldwide operation of Rotary is materially dependent on a delicate balance of divergent attitudes in diverse cultures, and that judicial interference with this balance, as reflected by the votes in Rotary's Council on Legislation, would risk a material and harmful disruption of the existing cooperative integrity of Rotary International both inside and outside the State of California."

We have reviewed Mr. Pigman's testimony and conclude that while it supports the trial court's finding that the male-only-membership policy is valued by a substantial majority of Rotarians throughout the world and that, as a rule that has been internally agreed upon, it has enabled the organization to work effectively on a worldwide basis, it does not



support a finding that the admission of women into the local Rotary Club of Duarte would cause the downfall of the District or International or seriously interfere with Rotary's objectives.

In fact, Mr. Pigman's inability to decisively resolve the question of "what would be the impact on Rotary if a ruling prohibiting the organization from enforcing its male-only constitutional provisions," was unequivocally reflected when he testified, "It is difficult for me to conjecture or discern what might happen to Rotary International if its ability to agree upon its own rules of procedures were to be dictated by decisions, forces external to its own operations."

Moreover, arbitrary and blatant acts of sex discrimination against the women of this state which violate the Unruh Act will not be tolerated merely because refusing to tolerate them may have an impact or effect on business establishments situated beyond our territorial boundaries.

## B

The trial court explained plaintiffs' failure to establish damages as follows:

"The Court finds that plaintiffs have not demonstrated that membership in the Duarte Club prior to its expulsion from Rotary comprised a substantial source of business contacts. In fact, Duarte was having difficulty attracting members. The Court further finds that the expulsion of Duarte from Rotary did not harm it as a vehicle for making business contacts. In fact the size of its membership and the vigor of its activities thereafter increased. The three female members of Duarte, *by their own admission*, did not join Duarte for professional benefits and disclaim any harm to their careers by reason of expulsion of Duarte by Rotary. The Court does not accept as true the speculation that at some

time in the future their careers *might* suffer from Rotary's male-only policy. This Court is not persuaded by the evidence introduced in this case that the 'male-only' membership restriction of Rotary has deprived any women of any material or substantial economic advantage . . ." (Emphasis in original.)

None of these particular findings constitutes a basis on which injunctive relief may properly be denied in this case. We have already concluded that International and Duarte are business establishments and as such they are prohibited from discriminating against members and potential members on the basis of sex.

In this case, Duarte admitted Bogart, Elliot and Freitag into membership. In revoking Duarte's charter because it admitted women into membership and refused to expel them, International's Board clearly violated the Unruh Act. The Unruh Act proscribes not only International's direct discrimination against women but also discrimination against Duarte on account of its association with women. (See *Winchell v. English*, *supra*, 62 Cal.App.3d at p. 129.) Moreover, as the discrimination was arbitrary, damages are presumed.

In *Koire v. Metro Car Wash*, *supra*, 40 Cal.3d 24, a majority of the California Supreme Court, in rejecting the argument that sex-based price discounts cause no injury to either men or women, declared "that by passing the Unruh Act, the Legislature established that arbitrary sex discrimination by business is *per se* injurious." (*Id.* at p. 33.) The *Koire* court noted that "[s]ection 52 provides for minimum statutory damages of \$250 for *every* violation of section 51, *regardless* of the plaintiff's actual damages." (*Ibid.*, fn. omitted; emphasis in original.) Moreover "[a]lthough the Unruh Act makes no express provision for injunctive relief, that remedy as well as damages may be available to an

aggrieved person.' ” (*Id.*, at p. 28, fn. 5, quoting *Burks v. Poppy Construction Co.*, *supra*, 57 Cal.2d at p. 470.)

The ill effects of discrimination against the individual as well as on society are well recognized. Our nation's Supreme Court in *Roberts v. United States Jaycees* (1984) 468 U.S. \_\_\_\_ [82 L.Ed.2d 462, 104 S.Ct. 3244], succinctly stated that it “has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.” (82 L.Ed.2d at p. 476.)

## VI

International argues that forcing it to excuse compliance with the male-only-membership policy would violate the associational freedoms afforded it by the federal Constitution.

In *Roberts v. United States Jaycees*, *supra*, the United States Supreme Court ruled that application of the Minnesota Human Rights Act to prevent sex discrimination perpetuated by membership policies of the United States Jaycees, a nonprofit membership corporation, did not violate that organization's freedom of intimate or expressive association.

It is well recognized that freedom of intimate association is a fundamental element of personal liberty and “because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of

sanctuary form unjustified interference by the State.” (82 L.Ed.2d at p. 471.)

In discussing freedom of intimate association, the *Roberts* court noted that among the highly personal relationships that are entitled to this constitutional shelter “are those that attend the creation and sustenance of a family”—marriage, childbirth, the raising and educating of children and living with relatives. The *Roberts* court further explained:

“Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection. Accordingly, the Constitution undoubtedly imposes constraints on the State’s power to control the selection of one’s spouse that would not apply to regulations affecting the choice of one’s fellow employees. [Citations.]

“Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual’s freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship’s objec-

tive characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. [Citation.] We need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent. In this case, however, several features of the Jaycees clearly place the organization outside of the category of relationships worthy of this kind of constitutional protection." (82 L.Ed.2d at pp. 472-473.)

The *Roberts* court concluded that the Jaycees was not entitled to the constitutional protection afforded by the freedom of intimate association because local chapters of the Jaycees were large in size and membership in the organization was unselective.

In the present case, the trial court found that the "primary purpose of Rotary is to encourage a fellowship among business and professional men representing a diverse cross-section of the business and professional activities within the local community" and "to promote a variety of voluntary, civic, eleemosynary, and charitable 'service' activities" on local, national and international levels. The trial court further found that membership is selective since it "is neither solicited from nor is it available to the public generally."

In reliance on these findings, International contends, that unlike the Jaycees, it is entitled to the protection of the freedom of intimate association. We disagree.

While the membership criteria set forth by International and by which local clubs must abide is selective, the immense size of International and the number of Rotarians throughout the world is hardly indicative of an intimate relationship. Moreover, while fellowship and service to the community play a very important part in the Rotary organi-



zation, the business benefits and commercial advantages to be gained are also clearly an inducement for the business and professional leaders of the community to join.

Additionally, Rotarians are required to attend weekly meetings. When a Rotarian misses a meeting he is required to make up that meeting by attending the meeting of another club anywhere in the world. International's own literature states that "[a]s a member of the Rotary family, [the individual Rotarian] has a universally recognized right of entry into any Rotary club meeting anywhere in the world. . . ." (Rotary Basic Library, Focus on Rotary, vol. 1, p. 68.) It follows then that that club may not, selectively or otherwise, exclude a foreign Rotarian's attendance at its meetings. The trial court itself found that "[i]nternational travel results in a material amount of club visitation by foreign Rotarians." By its own requirements, then, congeniality on a worldwide level is encouraged. From these features we conclude that International and Rotary District 530 lack the distinctive characteristics that might afford them the constitutional protection to compel local Rotary clubs to exclude women. (82 L.Ed.2d at p. 474.)

With respect to the freedom of expressive association the *Roberts* court stated:

"Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. Among other things, government may . . . try to interfere with the internal organization or affairs of the group. [Citation.] By requiring the Jaycees to admit women as full voting members, the Minnesota Act works an infringement of the last type. There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original



members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate. [Citation.]

"The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." [Citations.] . . . ." (82 L.Ed.2d at pp. 474-475.)

The *Roberts* court then concluded "that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms" (82 L.Ed.2d at P. 475) and that the state interest was being furthered by the least restrictive means as the Jaycees failed to demonstrate that the Minnesota Act "imposes any serious burdens on the male members' freedom of expressive association." (*Id.*, at p. 477.)

A similar conclusion is mandated in this case. To the extent that International's freedom of expressive association is involved, infringement of this right is clearly justified by this state's compelling interest in abolishing sex discrimination by business establishments.

Like the Minnesota Act, the Unruh Act "does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria." (82 L.Ed.2d at p. 475.) It does not require International to change its objectives or to open membership

to the entire public at large, nor does it invalidate its selective membership requirements.

We therefore conclude that application of the Unruh Act to International does not abridge its freedom of intimate or expressive association.

## VII

The trial court noting that "[t]here has been neither a showing [nor] a claim that Illinois law has been violated, [nor] have plaintiffs demonstrated any economic or other reasons why, under well-settled constitutional principles of interstate comity, the law of Illinois should not be the sole test of that corporation's internal membership rules" concluded "that these extra-territorial considerations alone are sufficient to decline granting the drastic injunctive relief sought by plaintiffs."

Whether or not International's male-only-membership policy violates Illinois law is not controlling in this case. Nothing we have said prevents, or can prevent, International from adopting or attempting to enforce membership rules or restrictions outside of this state or lawful restrictions inside this state. Neither notions of interstate comity nor the full, faith and credit clause of the federal Constitution, however, compel us to permit International, a foreign corporation, to enforce its male-only-membership policy in this state in violation of the Unruh Act. Neither 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, section 289 nor *Order of Travelers v. Wolfe* (1947) 331 U.S. 586, upon which the trial court relied compel a contrary conclusion. Consequently, we conclude that extra-territorial concerns do not justify the denial of injunctive relief.

## VIII

The trial court found that because "Duarte admitted women to membership in knowing violation of Rotary's membership restriction" it was guilty of unclean hands thereby precluding the granting of injunctive relief.

The clean hands doctrine has no applicability in this case. "The maxim 'he who comes into equity must come with clean hands' should not be invoked when the act sought to be enjoined is against public policy." (*Jomicra, Inc. v. California Mobile Home Dealers Assn.* (1970) 12 Cal.App.3d 396, 402.)

Public policy in this state strongly supports the abolition of discrimination on the basis of sex. This policy is effectuated, in part, by the Unruh Act which expressly proscribes sex discrimination by business establishments. (*Koire v. Metro Car Wash, supra*, 40 Cal.3d at p. 36.) Insofar as the act sought to be enjoined in this case is arbitrary sex discrimination violative of the Unruh Act, the trial court abused its discretion in denying injunctive relief on an unclean hands theory.

## IX

"Granting or denying an injunction is within the sound discretion of the trial court and will be upheld on appeal absent an abuse of discretion. Discretion is abused when a court exceeds the bounds of reason or contravenes uncontradicted evidence." (*Jessen v. Keystone Savings & Loan Assn.* (1983) 142 Cal.App.3d 454, 458.)

The injury caused and perpetuated by International's sex discrimination is both "great and irreparable" and cannot adequately be compensated by money. (See Code Civ. Proc., § 526, subds. (2) and (4).) This conclusion, together

with our foregoing discussion and conclusions, establishes that the trial court abused its discretion in denying Duarte, Freitag and Elliot injunctive relief.

Rotary literature describes "The 4-Way Test" as "a yardstick for living" which "aims to encourage the ethical instincts in every person and constitutes a simple and practical guide for people of all cultures." (Rotary Basic Library, Vocational Service, vol. 3, p. 39.)

Rotary advocates application of the following 4-way test to the things "we think, say or do":

1. Is it the TRUTH?
2. Is it FAIR to all concerned?
3. Will it build GOODWILL and BETTER FRIENDSHIPS?
4. Will it be BENEFICIAL to all concerned?

While the Rotary organizations are in large part very well motivated and accomplish much good, International's discriminatory policy towards women clearly violates this test and evidences International's failure to practice toward women the fairness "to all" that it preaches.

## X

In light of our conclusion that International violated the Unruh Act and that injunctive relief should have been granted, we need not, and do not, decide whether article 1, section 8 of the California Constitution requires state action or whether International's male-only-membership policy violates that constitutional provision.

The judgment is reversed. The matter is remanded to the trial court with directions to enter a new and different judgment in favor of Rotary Club of Duarte mandating the

Board of Directors of Rotary International and Rotary District 530 to reinstate Rotary Club of Duarte's charter thereby reinstating it as a member of Rotary International and Rotary District 530 and permanently enjoining Rotary International and Rotary District 530 from enforcing or attempting to enforce its male-only-membership restriction against Rotary Club of Duarte.

CERTIFIED FOR PUBLICATION

McCLOSKEY, J.

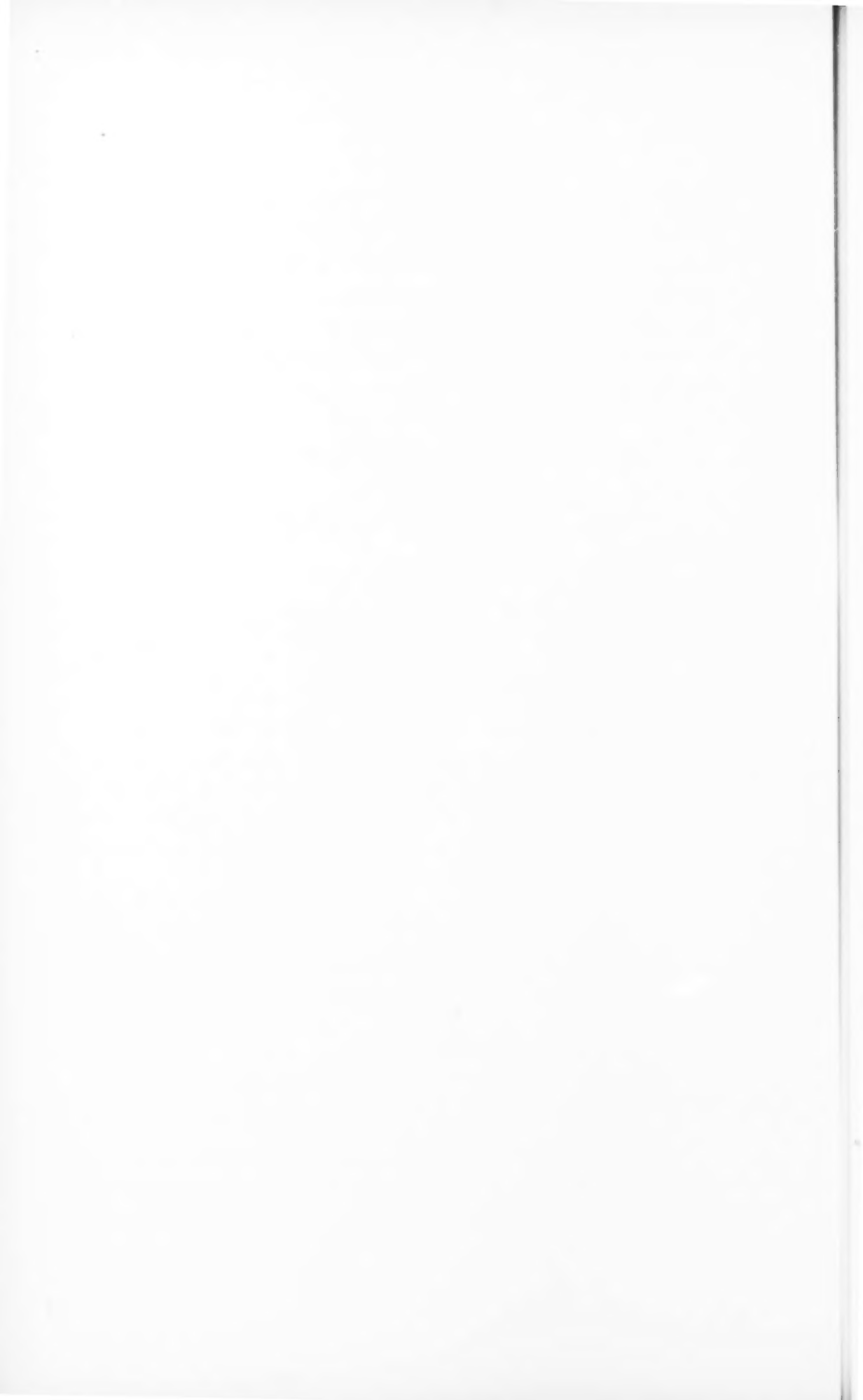
We concur:

WOODS, P. J.

SHIMER, J.\*

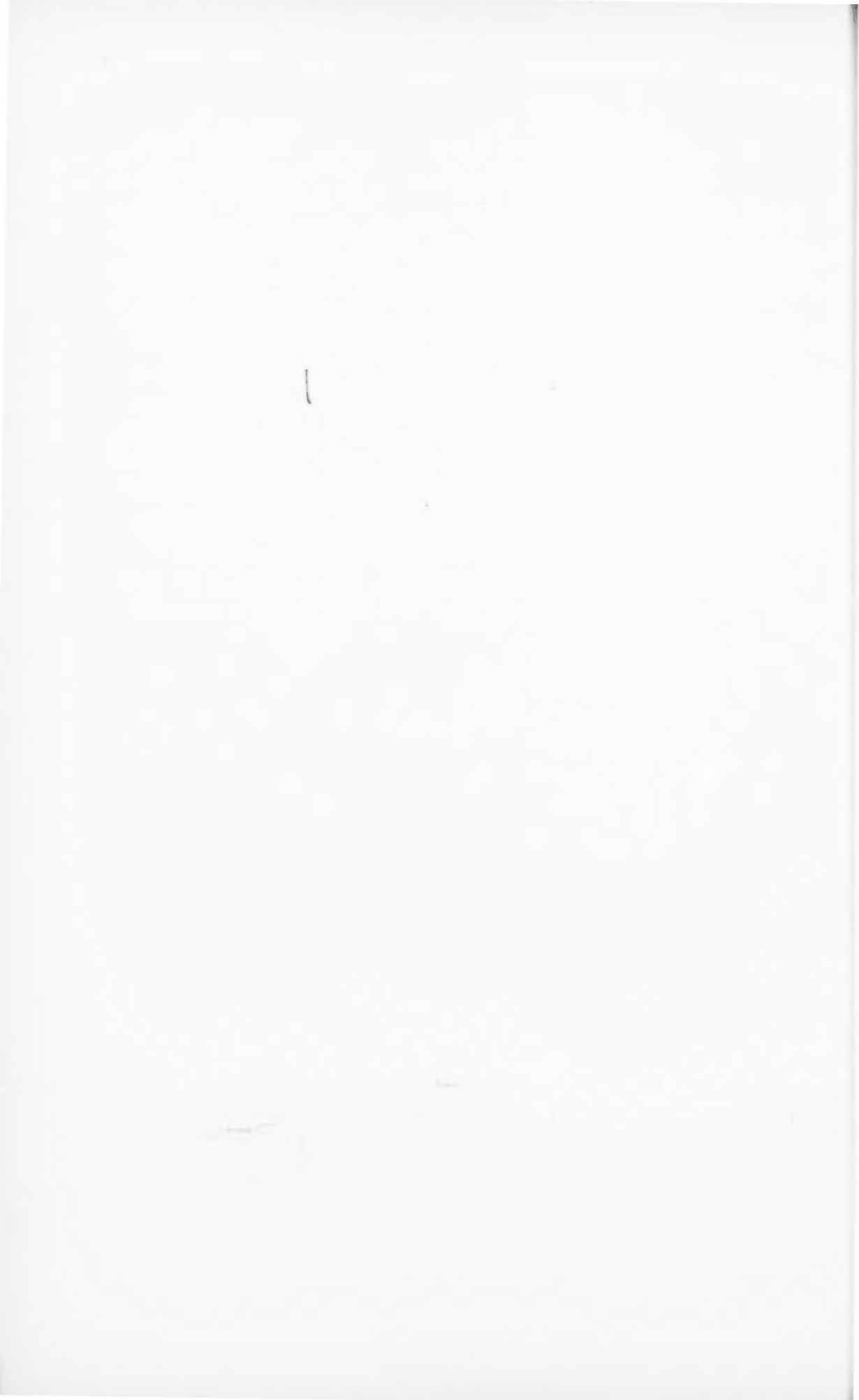
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\* Assigned by the Chairperson of the Judicial Council.





## **APPENDIX D**



D-1

ORDER DENYING REVIEW  
AFTER JUDGMENT BY THE COURT OF APPEAL  
2nd District, Division 4, No. B001663  
IN THE SUPREME COURT OF THE STATE OF  
CALIFORNIA

IN BANK

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ROTARY CLUB OF DUARTE *et al.*

v.

BOARD OF DIRECTORS OF ROTARY INTERNA-  
TIONAL *et al.*

---

Respondents' petition for review DENIED.

---

BIRD  
Chief Justice



## **APPENDIX E**





DARLING, HALL & RAE  
WM. JOHN KENNEDY  
1900 CITY NATIONAL BANK BUILDING  
606 SOUTH OLIVE STREET  
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627-8104  
ATTORNEYS FOR DEFENDANTS-RESPONDENTS.

IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA  
SECOND APPELLATE DISTRICT,  
DIVISION FOUR

ROTARY CLUB OF DUARTE, *et al.*,  
*Plaintiffs and Appellants,*

vs.

BOARD OF DIRECTORS OF  
ROTARY INTERNATIONAL, *et al.*,  
*Defendants and Respondents.*

2d CIV. NO. B  
001663

Superior Court  
No. C244753

NOTICE OF  
APPEAL TO  
THE UNITED  
STATES  
SUPREME  
COURT

NOTICE IS HEREBY GIVEN that Defendants/ Appellees herein Board of Directors of Rotary International and Rotary District 530, appeals to the Supreme Court of the United States from the judgment of this Court issued March 17, 1986, and amended on April 9, 1986. A timely Petition for Review to the California Supreme Court was denied on June 18, 1986.

This Appeal is taken pursuant to Title 28, United States Code, § 1257(2) within the time provided in 28 U.S.C. § 2101(c) and United States Supreme Court Rules 11, 12, 20 and 21.

E-2

The Appeal contends that the decision violates Defendant/Appellees' rights of freedom of association and due process under the First and Fourteenth Amendments to the United States Constitution.

DATED: July 14, 1986.

DARLING, HALL & RAE  
WM. JOHN KENNEDY

By: WM. JOHN KENNEDY  
Wm. John Kennedy

**PROOF OF SERVICE BY MAIL**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action or proceeding. My business address is 606 South Olive Street, Suite 1900, Los Angeles, California 90014-1521. On July 15, 1986 I served the within NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT on the interested parties in this action or proceeding by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

CAROL AGATE, ESQUIRE  
SANFORD K. SMITH, ESQUIRE  
FRED OKRAND, ESQUIRE  
ACLU FOUNDATION OF SOUTHERN  
CALIFORNIA  
633 South Shatto Place  
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County Clerk, Los Angeles County Superior Court  
For the HONORABLE MAX F. DEUTZ  
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CLERK, Court of Appeal  
Second Appellate District  
3580 Wilshire Boulevard, Room 301  
Los Angeles, California 90010  
(Original and 3 copies—HAND DELIVERED)

CLERK, California Supreme Court  
3580 Wilshire Boulevard, Room 213  
Los Angeles, California 90010

JOHN K. VAN DE KAMP  
Attorney General  
Department of Justice of the State of California  
3580 Wilshire Boulevard, Room 800  
Los Angeles, California 90010

EXECUTED on July 15, 1986 at Los Angeles,  
California.

I declare under penalty of perjury that the foregoing is  
true and correct.

---

Laura G. Canizares

## **APPENDIX F**



DARLING, HALL & RAE  
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SUPERIOR COURT OF THE STATE OF  
CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ROTARY CLUB OF DUARTE, MARY  
LOU ELLIOTT, AND ROSEMARY  
FREITAG,

*Plaintiffs,*

v.

BOARD OF DIRECTORS OF RO-  
TARY INTERNATIONAL, ROTARY  
DISTRICT 530, PAUL G. BRYAN,  
OLIVER BATCHELLER, and DOES I  
through XX,

*Defendants.*

CASE NO.  
C 244 753

STIPULATION  
REGARDING  
CERTAIN UNDIS-  
PUTED FACTS  
AND RELATED  
PORTIONS OF  
THE RECORD

The parties hereto, through their attorneys of record,  
stipulate that the facts stated in Parts I, II and III hereof



(including the contents of the identified Exhibits) should be regarded as true.

The discovery identified in Part IV truly defines the particularities of plaintiffs' factual contentions, in response to which defendants have shaped their trial preparation. However, its inclusion in this stipulation does *not* connote agreement by defendants with these factual contentions, many of which are disputed.

## I

### STRUCTURE OF ROTARY INTERNATIONAL

Rotary International is an Illinois not-for-profit corporation. Membership in that corporation serves as the vehicle for the worldwide association of local Rotary clubs. In August 1982 there were approximately 19,788 of such clubs worldwide. The individual members of those local clubs totaled approximately 907,750 men.

Further factual specifics of the Rotary movement which are not in dispute are found in the following documents which are submitted concurrently herewith and incorporated herein by reference:

1. The transcript of the deposition of Herbert A. Pigman, General Secretary of Rotary International, taken July 19, 1982 (except for those portions to which specific objections were made and appear in that transcript).
2. "Manuals of Procedure" dated 1975, 1978 and 1981 comprising Exhibits A1, A2 and A3 to Mr. Pigman's deposition.
3. "Rotary Basic Library" (seven paperback volumes in cardboard container) comprising Exhibit B to Mr. Pigman's deposition.

4. "Extension Manual No. 8108" comprising Exhibit C to Mr. Pigman's deposition.

5. "Summary of Service Activities", 1977-1978, Eight Rotary Clubs in Vicinity of Duarte, California, U.S.A. (Rotary District 530), comprising Exhibit D to Mr. Pigman's deposition.

6. True copies of miscellaneous reports to Rotary International by District 530 governor, comprising Exhibit E to Mr. Pigman's deposition.

7. August 1980 issue of Rotarian Magazine, comprising Exhibit F to Mr. Pigman's deposition.

## II

### **THOSE PORTIONS OF FACTUAL CHRONOLOGY RELATING TO THE DUARTE CLUB'S EXPULSION WHICH ARE NOT IN DISPUTE**

For several years prior to 1977, the plaintiff Rotary Club of Duarte (hereinafter "Duarte"), and successive governors of Rotary District 530, had been concerned that Duarte's membership had at times fallen below 20 members. Duarte had discussed among its own members that such membership growth objectives might be facilitated if Rotary International changed its existing policy to permit local clubs to admit female members.

In March 1977 Duarte unanimously voted to urge the District 530 governor to support efforts to modify the "male only" constitutional restrictions at the June 1977 meeting in San Francisco of Rotary's legislative council. On March 7, 1977, Duarte's Vice President Richard Kay transmitted that request to District Governor Paul E. Lippold by a letter, the text of which appears in Exhibit G attached hereto and

incorporated herein. In June 1977 the Rotary legislative council rejected proposals to amend the "male only" constitutional provision, and at all pertinent times thereafter Duarte was aware of the rejection.

On July 1, 1977, Defendant Paul Bryan succeeded Paul Lippold as Rotary's District 530 governor. In July 1977 Mr. Bryan visited a regular weekly meeting of Duarte. What occurred at that visit will be the subject of testimony at trial.

At a time prior to July 1977, Duarte voted to admit Donna Bogart as an active regular member. During the period October-November 1977, Duarte admitted plaintiffs Mary Lou Elliott and Rosemary Freitag as active regular members. Prior to their admission to Duarte, all three women were informed by Duarte that the membership provisions of Rotary did not then allow women members and that Duarte was attempting to obtain a modification of that membership restriction. Prior to its hereinafter described termination by Rotary International, Duarte did not admit additional female members.

At all pertinent times herein, Donna Bogart was employed as an elementary school principal by the Duarte Unified School District; Mary Lou Elliott was employed as a junior high school principal by the Duarte Unified School District; and Rosemary Freitag was employed as a regional community services coordinator by the San Gabriel Valley Mental Health Region. All three women at their depositions herein stated that they did not join the Duarte Club for the express purpose of promoting their business or professional careers. Additionally, all three women, at their depositions, stated that they did not feel that they had been impeded in the pursuit of their business and/or professional careers or financially damaged by any actions of Rotary International.

On December 4, 1977, Duarte held a dinner celebrating its 25th anniversary in Rotary. Several Rotarians from surrounding clubs and several past district governors attended. All three of the aforesaid women members also attended. As a result of that dinner meeting, the headquarters of Rotary International in Evanston, Illinois received complaints concerning the admission by Duarte of female active members.

Thereafter, during December 1977 and January 1978, Rotary International advised Duarte that it was in violation of the membership restrictions of Rotary and must terminate its female members if it desired to continue as a part of Rotary International. All three women offered to resign. However, Duarte voted not to ask for their resignations or to otherwise discontinue their membership, and so informed Rotary International.

On March 27, 1978, in full compliance with its procedural rules pertaining to such matters, Rotary International terminated the membership of Duarte. Annexed hereto are true copies of the following documents pertaining to such membership termination:

1. A transcript of the hearing held by the Rotary Board of Directors on February 23, 1978, together with the writings submitted by Duarte at that time (Exhibit H hereto).
2. The text of Decision 241 of Rotary International's Board of Directors following said hearing (Exhibit I hereto).
3. The text of Duarte's telegram of March 27, 1978 specifying its grounds for appealing the decision of Rotary's Board of Directors (Exhibit J hereto).
4. The text of Duarte's written appeal from the decision of the Rotary Board of Directors (Exhibit K hereto).

5. A transcript of the hearing on Duarte's appeal presented in Tokyo, Japan on May 9, 1978 (Exhibit L hereto).

Duarte engaged its present counsel on March 1, 1978.

Rotary International has tendered to Duarte checks comprising refunds for all per capita dues paid by Duarte on behalf of its three female members. On advice of counsel, Duarte has not cashed such checks.

Since the filing of this lawsuit, Donna Bogart and Rosemary Freitag have voluntarily ceased to be members of Duarte. Mary Lou Elliott continues as a member of the club.

On the advice of counsel, Duarte has refused the demand of Rotary International to return its charter document. Over the objections of Rotary International, Duarte, on its club stationery and otherwise, publicly refers to itself as the "Ex-Rotary Club of Duarte" and at its weekly meetings Duarte uses a podium with its former Rotary emblem, modified by taping an "X" across its face.

### III

#### POLICY ON DISCRIMINATION

Rotary International does not discriminate on the grounds of race, religion or national origin and welcomes local clubs having memberships that are representatives of the diverse origins of their local population. The Rotary Club of Duarte has for many years been such a racially, religiously, and ethnically diverse club.

IV

**STATEMENT OF PLAINTIFFS' CONTENTIONS  
IN PRETRIAL DISCOVERY**

In response to certain pre-trial discovery described more particularly below, plaintiffs have defined more particularly the specific contentions of fact which underlie their pleadings. For the convenience of the Court, such discovery and plaintiffs' answers thereto are compiled and attached hereto. Unlike prior portions of this stipulation, the parties have not agreed as to the truth of the content of the discovery, but do stipulate that it truly represents the precise definition of plaintiffs' factual contentions in response to which defendants' prepared their defense.

1. Exhibit M is the text of Defendants' first set of interrogatories to plaintiff (Nos. 1-14) together with Plaintiffs' Answers (and Supplemental answers) thereto (February-June 1981).

2. Exhibit N is the text of Defendants' second set of interrogatories to plaintiff (Nos. 15-42), together with plaintiffs' answers thereto (May 1982).

3. Exhibit O is the text of Defendants' Requests for Admission Nos. 6 and 7, and Plaintiffs' Answers thereto (August-November 1982).

4. Exhibit P is the text of Defendants' Third Set of Interrogatories to Plaintiffs (Nos. 43-61), together with Plaintiffs' Answers thereto (August-November 1982).

F-8

The foregoing Stipulation is agreed to this 29th day of November, 1982.

SANFORD K. SMITH  
CAROL AGATE  
FRED OKRAND

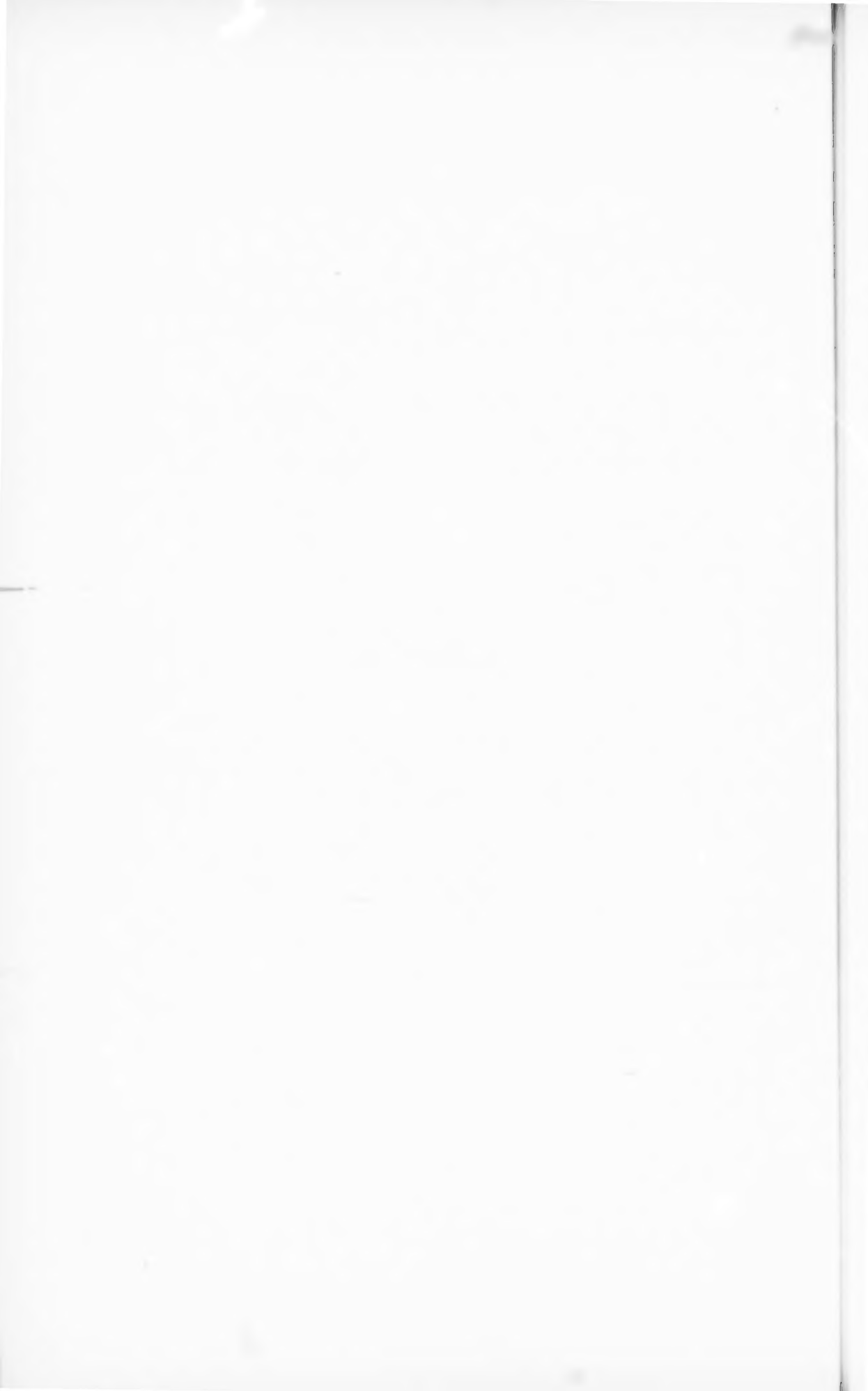
DARLING, HALL & RAE

By SANFORD K. SMITH  
Sanford K. Smith  
Attorneys for Plaintiffs

By WM. JOHN KENNEDY  
Wm. John Kennedy  
Attorneys for Defendants



## **APPENDIX G**



SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

ROTARY CLUB OF DUARTE, MARY  
LOU ELLIOTT and ROSEMARY  
FREITAG,

*Plaintiffs,*

vs.

BOARD OF DIRECTORS OF RO-  
TARY INTERNATIONAL, ROTARY  
DISTRICT 530, PAUL G. BRYAN,  
OLIVER BATCHELLER AND  
DOES I THROUGH XX,

*Defendants.*

No. C 244, 753

The deposition of HERBERT A. PIGMAN, before  
Roberta Bachmann, C.S.R., a notary public, in and for the  
County of Cook, State of Illinois, at 1600 Ridge Avenue,  
Evanston, Illinois, on Monday, July 19, 1982, at 1:00 o'clock  
P.M.

PRESENT:

MR. SANFORD K. SMITH,  
(301 Oxford Drive,  
Arcadia, California 91006),  
Appeared on behalf of Plaintiffs;

DARLING, RAE & GUTE,  
(400 Pacific Mutual Building,  
523 West Sixth Street,  
Los Angeles, California 90014),  
BY MR. WM. JOHN KENNEDY,  
Appeared on behalf of Defendants;

DAVIS & CICHORSKI,  
(115 South LaSalle Street,  
Suite 2680,  
Chicago, Illinois 60603),  
BY MR. MITCHEL P. DAVIS and  
MR. ARTHUR F. CICHORSKI,  
Appeared also for Defendants.

ALSO PRESENT:

MR. JERRY NEIGHBORS  
MR. JONATHAN FISKE  
MR. PHILLIP LINDSEY.

MR. KENNEDY: This is a deposition being taken in the case Rotary Club of Duarte, et.al., vs. Board of Directors of Rotary International, et.al. in the Los Angeles Superior Court, Civil Action No. C244,753.

This is being taken essentially by stipulation, but also pursuant to a notice of deposition which I will ask the reporter to attach to the transcript of the deposition.

HERBERT A. PIGMAN,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KENNEDY:

Q Mr. Pigman, will you state your name for the record, please?

A Herbert A. Pigman.

Q Mr. Pigman, I take it, you understand the general function of this deposition, but let me just outline, for the record, the formalities of the record, certain facts about a deposition.

The purpose of this deposition, specifically, is to make available for use in the trial of this action such matters as we have discussed. You are under oath, you should conduct yourself today in the same way you would conduct yourself if you were actually sitting in court with a judge. You should answer questions as carefully as you can.

After this oral deposition today, the contents of everybody's comments will be typed up verbatim and a written copy of the transcript will be resubmitted to you for you to review, make any corrections which you deem necessary to make your testimony more accurate and signed before a notary public. Although you are given an opportunity to make corrections, it is open to any counsel to comment on the facts that, on second thought, your testimony was modified, which is—can be all right, but it can raise inferences that you changed your testimony, so you should try to answer the questions as carefully as you can and if questions, by either me or by Mr. Smith, you don't understand them, please feel free to so state.

Mr. Smith, do you have anything you want to add before we go ahead?

MR. SMITH: Do you wish to make a stipulation as to waiving objections at this time, but not waiving them at the time of trial, if it is, indeed, submitted for evidence?

MR. KENNEDY: I would prefer that—no. I would rather that you do make your objections, particularly since we are intending to use Mr. Pigman's deposition in the trial, that will enable me to reframe the question.

MR. SMITH: Fair enough, that will be my understanding.

MR. KENNEDY: I would appreciate it if you would treat this with all the formalities.

Q Mr. Pigman, what is your present occupation?

A Well, my present occupation is that of General Secretary of Rotary International, which is the active managing officer of the worldwide association.

Q When did you first become associated in any regard with the Rotary International movement?

A On employment with Rotary International in May, 1956.

Q Prior to that time, were you a member of any local Rotary Club?

A No.

Q All right. Starting in May of 1956, will you chronologically describe the various positions which you have held in Rotary International by title, years in which you exercised them and some description of what you actually were doing?

A Well, the sequence was, on employment, an editorial assistant with the official magazine of the association, "The Rotarian." There were general editorial duties of writing and editing. Subsequently promoted to assistant editor.

In 1964, I was appointed as a special assistant to the General Secretary for Program and within a few months after that appointed to Manager-Program Division and this division is concerned with the development of ways and means of the association achieving its objective, research, leadership, development, education and publications.

In 1976 I was appointed as Executive Assistant to the President of Rotary International and on January 1, 1979, as a result of an election by the Board of Directors, I became

General Secretary. In that role, which is described in our bylaws as active managing officer, that incorporates all the duties that normally fall to the managing officer of an association such as this kind, staff coordination, carrying out those policies which are developed by the board and the convention and overseeing and coordinating the various functions to this central office and its several branch offices around the world.

Q Am I correct that the General Secretary is the most senior full-time employee of the Rotary International?

A That is correct, in terms of responsibility.

Q In addition to your duties as an employee of Rotary International, have you been a member of a Rotary Club during this—during this period of time?

A Yes. I have been an active member of the Rotary Club of Evanston, Illinois since 1964.

Q And have you—what positions have you held in that club?

A I have held a number of committee chairmanships, I have served on the Board of Directors and I served as President of the club in 1977-78.

Q To what extent have your duties with Rotary International and/or your participation in the Rotary Club of Evanston made you familiar with the workings and purposes and procedures of the Rotary movement?

A Well, my assignments here have required that I acquire a good grasp of the working principles and policies of the organization, because all these are described and interpreted in the various publications of the organization which number in the hundreds.



It has been my responsibility to write about them, to explain them, to incorporate them in various training manuals and procedures and to use this knowledge in responding to correspondence that reaches this office.

The duties have also enabled me to get some first-hand observation of how Rotary clubs operate and these travels and various meetings have taken me to more than 35 countries of the world.

MR. KENNEDY: Off the record.

(Discussion off the record.)

BY MR. KENNEDY:

Q Mr. Pigman, I will show you three books, each of which is entitled "Manual of Procedure," the first being dated August, 1975, the second being dated 1978 and the third being dated 1981. Will you, generally, please tell me what the Manual of Procedure is?

A Well, the Manual of Procedure is a publication of Rotary International, which is published every two or three years and it consists of two parts.

The first part is the—comprises the constitutional documents of Rotary, the constitution of the worldwide association, its bylaws, the standard Rotary Club constitution to which all members are required to conform and a set of recommended bylaws for the club.

The other part of the manual is a compilation of policies and statements by the board on constitutional affairs, advice on various matters and board-created policies which have become part of the custom and tradition procedures of the organization and they are codified in the regular and uniform manner and published in this form by this office.

Q Is the Manual of Procedure an authoritative statement of Rotary practices and principles?

A Yes. And it is distributed upon publication to each of the units of the association, which are the member Rotary clubs.

Q What is the significance of the dates of revision? Do they relate to any particular event?

A The Manual of Procedure is updated and printed as soon as possible following the meeting of the Triennial Council on Legislation, which is the legislative body of Rotary International. The changes in the constitutional documents are incorporated as are the most recent policies or any changes thereon caused by changes of the constitutional bylaws.

Q Now, specifically bearing in mind that this case involves certain transactions between members of the Rotary Club of Duarte and—the Rotary Club of Duarte on the one hand and the District Governor of the Rotary International Association District 530 and of Rotary International itself on the other hand, beginning approximately in the spring of 1977 and extending through early 1978, with that date framework, when did the changes enacted at the 1977 Legislative Council session formally take effect, what date?

A January 1, 1978.

Q Now, I show you the Manual of Procedure, dated August, 1975, and am I correct in saying that that is the—and bearing in mind that the next revision is the document "Manual of Procedure," dated 1978, my question is, would it have been—am I correct in saying that it would have been the document dated August, 1975 that would have been in the hands of most Rotarians during the pertinent period of time that we are talking about?

A That would have been in the possession of all the clubs in the association during that period, yes.

Q And with respect to the—in each of these Manuals of Procedure, as you have related, in the back there are copies of the constitution of Rotary International, the bylaws of Rotary International and certain standards and bylaws for the individual clubs, is my understanding correct that, in 1975, the Manual of Procedure, the blue covered one, the documents of the constitution, et.al. were in effect up through December 31, 1977?

A Yes.

Q And that the documents in back of—the corresponding documents in the back of the 1978 Manual of Procedure represented the up-to-date form of those documents, beginning January 1st, 1978?

A That's correct.

Q And the Manual of Procedure for 1981 also has a set of constitutions and bylaws, et cetera in the back; when did those documents take effect, in January of 1981?

A January 1, 1981.

MR. KENNEDY: I would like these three documents marked collectively Defendant's Exhibit A to this deposition.

Counsel, based upon the foundation laid by Mr. Pigman, I will offer these in evidence at trial. May I have a stipulation that they may be introduced at trial?

MR. SMITH: We have no objection, provided you will provide us copies.

MR. KENNEDY: Certainly.

(Whereupon Defendant's Exhibits A1 through A3 and Defendant's Exhibit B were marked as requested.)

BY MR. KENNEDY:

Q Mr. Pigman, I show you a collection of seven paperback books contained in a box, the box collectively entitled "Rotary Basic Library." Are these official publications of Rotary International?

A Yes.

Q Is the description of Rotary activities as contained therein accurate and authoritative?

A Yes.

Q Would you very briefly go through the individual seven books, read the title and just very briefly describe the contents so that the Court can get a rough idea of what might be found in each one of them?

A The Rotary Basic Library is a compilation of procedures of the organization of the individual Rotary Club and, more importantly, a description of typical ways in which clubs and individual Rotarians carry out their service objective.

The first volume, "Focus on Rotary," is an overview of what a Rotary Club is, what its objective of service is and what Rotary International is, its scope and purpose.

The second volume, entitled, "Club Service," deals with the rules and regulations of Rotary, which are considered necessary and which are agreed upon by Rotary Clubs worldwide, which helps them to keep together a group of community leaders and keep them informed, enhance the fellowship of the group, describes the various requirements

of Rotary membership in the club, such as those related to financial obligations, to attendance, describes how new members are invited to become members, et cetera. It is the mechanistic aspects of a Rotary Club as well as those aspects that related to program in the sense of a weekly program and fellowship in the sense of relationship which builds among the members of a Rotary Club.

The next volume, which is entitled "Vocational Service," deals with one of the principle areas of Rotary's purpose and that is the promotion of high ethical standards by Rotary Club members in the work place or in their professions and it gives examples of how Rotarians have translated this idealistic concern into practical applications in their businesses and professions.

The volume on "Community Service," describes typical activities which Rotary Clubs undertake for the welfare of others, principally those in their community. Here you will find photos and descriptive text on the tremendous variety of activities that make the community a better place in which to live.

The fifth volume concerns activities that Rotary Clubs and individual Rotarians undertake to encourage and help youth, such activities as citizenship development, opportunities to travel abroad, to broaden their knowledge of other countries, scholarships, help for crippled children among others.

The sixth volume describes typical activities of clubs undertaken to build a better understanding and good will, friendly ties among peoples of different nations, all the principal programs that the Rotary Clubs voluntarily participate in are described in this volume.

The final volume describes the Rotary Foundation. This is a trust incorporated under the laws of Illinois, not incorpo-

rated, it is a trust in which Rotarians worldwide are invited to contribute voluntarily, to fund activities as a foundation which are all aimed at promoting friendly relations between people of different countries. The objective is peace.

The foundation is an organization controlled by 13 trustees. Its activities are philanthropic, charitable, eleemosynary and educational.

This entire Rotary Library is intended to inspire, motivate Rotary members to carry out the reasons for its existence, service to others.

Q The basic library, each of the elements of which you have described, is an official Rotary publication, is it not?

A Yes.

Q And it is current and up-to-date?

A Yes. It was published a few months ago in its English language edition.

Q Is it an accurate and authoritative statement and description of Rotary activities and organizations?

A Yes, it is.

MR. KENNEDY: Counsel, I would, at this point in the trial, offer the Basic Library and its contents in evidence.

MR. SMITH: We have no objection.

BY MR. KENNEDY:

Q Mr. Pigman, referring to the document in the library entitled, "Focus on Rotary," and particularly the charting immediately after page 33, 33 and 34, there seems to be something missing, 36 — they are blue pages, anyway, between pages 33 and 36. On the assumption that the Court is looking at these pages, will you describe, if you will, the



organizational pattern of Rotary International and its associated clubs and the Foundation?

A Well, Rotary International is an association of its 19,800 clubs, approximately, worldwide in 157 countries in geographical regions.

A club is a member of the association, voluntarily joining it, co-equal in every respect to every other club in the association.

Each club that joins the association agrees to abide by the rules as contained in the standard Rotary Club constitution, which it adopts upon admission to the organization.

Now, the association functions essentially with an interplay of the six components shown in the chart. There is an annual meeting of the association, to which—

Q Pardon me?

A Yes.

Q Let me just interrupt to make one point. The association, which is generally described as Rotary International, is an association of clubs as distinguished from individual members of those clubs, who are not members of the Rotary International Association directly, is that correct?

A That is correct.

Q All right. Will you please continue then?

A Well, the association, as directed in constitutional documents, holds an annual meeting at some place in the world, to which any Rotarian of any club is free to attend. The purpose is to conduct the business of the association and to promote international fellowship and acquaintanceship among Rotarians and to treat subjects of concern to Rotary's objectives in the vocational community and inter-



national service. It elects the officers of the association and I could provide more in detail on that, if you wish, later.

There is a body known as the Council on Legislation, which meets each three years. It is Rotary's parliament. It comprises representatives of the clubs in Rotary's 403 districts.

Q Just pardon me.

A Yes.

Q For the record, the last meeting, when was the last meeting of the Legislative Council?

A The last meeting was in June, 1980, the in the City of Chicago.

Q And prior to that, would it be more or less June of 1977?

A Yes, in '77 and in 1974. Prior to that, the Council met each two years.

Q Okay. Please continue.

A Well, the Council on Legislation is the mechanism by which any Rotary Club worldwide may propose changes to the constitutional documents or propose resolutions that would affect the policies and procedures of the organization.

These are all transmitted to the Council, where they are debated and voted upon. Those that are passed by the Council and are subsequently upheld by referendum of the members, of which they have an opportunity to vote yes or no on the action of Council, then become, on January 1, the law of the association.

All delegates to this Council on Legislation are elected through a democratic process ballot by mail or at a district conference on a district level.

Q Will you explain, I think, at this point, the district level is sort of an intermediate concept between Rotary International at the top and individual clubs at the bottom. In this particular case, District 530 has been named as a separate defendant from Rotary International, so, therefore, I would appreciate it if you would explain to the Court how a district fits into this pattern of organization?

A A district is an arbitrary geographical territory, decided upon by the Board of Directors, comprising on the average of 50 clubs. It is headed by a volunteer Rotarian, who, for one year, serves as District Governor. This is a man brought forward by the clubs of that district, nominated by him and elected by the district at the International convention.

He assumes duty on July 1 for one year and his job is to be a friendly counselor to the clubs in his district, to provide them inspiration, to provide them with information, to make an official visit to each club and make an address to the club each year, to conduct a leadership training meeting related to Rotary on the district and to hold a meeting on the district level that is called a District Conference and is analogous on the district level to our worldwide convention.

Q All right. Would you then proceed with your general discussion, which I interrupted, of the organization?

A The Board of Directors comprises 17 persons, including the President and President-elect. Each of the directors is nominated by a zone or a region on an agreed upon rotating basis and serves on the board for two years.

This is the body that is the administrative body of Rotary International, is chaired by the President, who serves for one year. It supervises the work of the General Secretary and it supervises the work of the District Governors, who number 403 today around the world.

It is a worldwide representative body that, in its policy making and other decisions, tries to represent the best interests of all of the conditions which the association encounters worldwide.

They meet four times a year.

The General Secretary is a title given to the managing officer, a paid employee of the association.

Q A post which you are presently occupying?

A That is correct.

Q All right.

A And the General Secretary is assisted by a staff who provide information to its volunteer leaders on the district level and the club level, plan the meetings, produce the publications, maintain the records, collect and disburses the funds.

We do not—it is not the function of the General Secretary or his staff to create policy for the organization, but merely to inform clubs and leaders of what the policies are and to amplify, where necessary.

The District Governors I have described. They supervise and assist the clubs in their district. Their job is to help the club President and its other leaders be successful in carrying out the club objectives and, finally, the club itself, approaching 20,000 in number, and the membership of those clubs today exceeds 900,000 members in 157 countries.

Q Have there been any studies to determine more or less what an average size of an individual Rotary Club is?

A The average size is about 50, but they range in size from fewer than 20 to more than 900.

Q Now, I would like to go to the subject of membership, Mr. Pigman, and as we have discussed earlier, there is a distinction between membership in Rotary International, in which the members are the club, and the membership on the part of the individual persons, who are members of the individual clubs only, but not of Rotary International on a broader level, is that correct?

A That's correct.

Q Incidentally, am I correct that a corporation cannot be an individual member of a Rotary Club, only a human being?

A That's correct. Membership in a club is a personal membership and does not represent a company or other corporate entity membership.

Q Just for the guidance of the Court in any further studies it wishes to make, referring to the 1981 Manual of Procedure, in the table of contents, would you read off those sections which describe membership at the local level, at the individual level in the clubs?

A Referring to the contents page of the Manual of Procedure, you will note a chapter entitled "Membership in Rotary Clubs," pages 134 through 146 inclusive.

In relation to the individuals membership in a club, with respect to membership of a club in Rotary International, this would be covered in more than one chapter, namely, "Extension of Rotary," pages 92 through 101. "Territorial Limits," 205 through 207.

Now, I have alluded to part one. Under part two, Membership Provisions, Qualifications and so forth, are included in the three documents which together comprise the constitutional documents of Rotary, the constitution, the bylaws and the constitution of the club. The description of member-

ship and membership qualifications are found in Section 3 of Article 4 of the constitution of Rotary International.

Q These are of individual members, now, in individual clubs?

A That's correct, right.

Q Referring back to the question I asked you a minute ago, which you answered that a corporation cannot be a member of an individual club, does that reflect a particular policy decision on the part of Rotary International?

A Yes, it does.

Q Could you tell us what that policy decision is?

A Well, my statement was based upon a formal resolution adopted by the convention of Rotary International in 1929, the meeting of 1929, which is stated on page 134, Manual of Procedure edition. I quote:

"Membership in a Rotary Club is considered to be the personal membership of the individual and not of the partnership or corporation which the individual member represents."

Q Are you familiar with the policy considerations behind that decision?

A I was not present in Dallas in 1929, so I can only conjecture on the basis of my understanding of history what might have led to that.

Q Well, based upon your experience in Rotary and as the General Secretary, do you have an understanding of what it is implicit in that or, at least, how it's been understood, what the policy has been understood to reflect?

A Well, the basis of a person's membership in Rotary is the considerations of a person as an individual, as a community leader, as occupying a position of some importance in his business or profession and, in no way, has it been tied to a particular corporation or other entity. When a person is invited to become a member or proposed by a current member, the personal qualifications are the criteria against which his membership is assessed, not those of any business entity or institution with which he may be associated.

Q Now, delving a little more deeply in the subject of the addition of members, individual members to an individual club, at that level, now, are the procedures for the addition of individual members set forth in any of the bylaw documents, standard club constitution, et cetera, that are—let's refer to the 1981 edition of the Manual of Procedure.

A The qualifications of a member are included, as I stated, in Article 4, Section 3 of the constitution of Rotary International. The method of electing a member is in the province of the local Rotary Club, that is the method, and the Board of Directors of Rotary International has suggested a procedure to clubs for electing members. This appears in what is called the Bylaws of the Rotary Club, beginning on page 315 of the Manual of Procedure.

Q 1981 edition?

A That's correct. And, specifically, beginning with Article 11, "Method of Electing Members," and the various sections there describe the recommended procedures for the election of a member.

My personal observation is that while clubs are not required to adopt this particular method, that almost all clubs would adhere very closely to these basic steps and this basic sequence.

Q Again, dealing with the qualifications and selection of individual members in the local clubs, there is a classification system, which I presume is described in the 1981 Manual of Procedure, at pages 30 to 33, is that correct?

A Would you state your question again, please?

Q There is a classification system for the guidance in the selection of individual members in the local clubs, which, I take it, is described generally under the title "Classifications" down on pages 30 to 33 of the—

A That's correct.

Q I would ask you if you would, in your own words, describe that classification system for individual members and the function which it serves in carrying out the objectives of the Rotary?

A Well, the classification system of membership in Rotary was one of the earliest principles of membership in Rotary. The founder of Rotary and some of his friends, who met in Chicago and devised Rotary, each represented a different vocation or occupation and they desired this for several reasons. One was to have a fellowship based on diverse—men of diverse interests. They wanted to get a good cross section of the community, of its business and professional leadership and they felt that this form of membership would serve to ensure that the club comprised members with broad based interests, that would not become dominated by any occupational sector or professional sector and that they would eventually—it would enhance what developed into the primary purpose of service; that a group of men, representing all these diverse occupations would be better attuned to the needs of the community and better informed on how a group of altruistic men might address themselves to any problems.



The basic rule in Rotary is, with certain exceptions, based on variation of membership, to have one man from each classification.

Q How seriously does Rotary take these classifications and other screening principles in the screening of its individual members at the local club level?

A Well, let me answer that first on the basis of the degree of compliance which we require when a member is admitted to the association.

Rotary Club is formed by a group of men in a community or part of a community where Rotary does not presently exist, usually at the instigation of the District Governor or perhaps members of another Rotary Club that would see that that community would benefit from having a club.

The procedures of Rotary International do permit a new Rotary Club to be formed if it meets certain criteria.

Q Pardon me?

A Yes.

MR. KENNEDY: I will ask that this document, entitled, "Extension Manual No. 8108," be marked Defendant's Exhibit C to the deposition.

(Document marked as requested.)

BY MR. KENNEDY:

Q I hand it to you, Mr. Pigman, and does this manual describe the selection procedures which you are in the process of describing to the Court?

A Yes, it is. It is a manual that is used worldwide by all District Governors or their special representatives for the purpose of forming a Rotary Club and to move it through its various stages leading to its admission to Rotary International.

Now, one of the principle—you asked about classification, one of the principles is that Rotary Club must begin with no fewer than 20 members. These people must represent different classifications.

Furthermore, there must be available within the community 20 additional classifications, which would represent potential for membership growth.

The names of those interested in being Rotarians and the classification which they would represent in the club are scrutinized. At various stages a survey is done of the community to determine the separate and distinct classifications that do exist.

When that is developed, they seek to determine if there are men interested in being part of a Rotary Club, who would represent those classifications.

The district, the development of this list of names and the classification is done by an agent of the District Governor, known as a special representative of the District Governor, scrutinizes this list and makes certain statements which indicate that he has.

This is sent into the Secretary at the central office here for further review by staff and, if there are any apparent discrepancies in duplication of classification or lack of clarity, these are regularized before the club is admitted.

The club undergoes a provisional status, where it meets for a period of weeks or months, demonstrates that it is meeting regularly each week, following the rules and when all is in order, the recommendation for admission is acted upon by the board and the club is admitted.

Q What is the Principle of Extension as it appears in some of these documents, in the admission of local Rotary Club to Rotary International?

A Well, "extension," is a term used within Rotary to describe the process by which a new club is developed and admitted to the association.

Now, clubs result from voluntary efforts completely, in which Rotarians in an existing club and/or the District Governor, working in concert, try to bring about a new club in a community that does not have one.

We do not have, incidentally, paid employees of Rotary International who go out and attempt to organize clubs.

When the group of men is gathered and begins to meet under the conditions I have described and they agree to follow the constitution, to pay the dues and agree to the stated agreements, which you will find is part of this exhibit, then they are admitted to Rotary International and that is the way all the clubs of Rotary International have been brought into the association worldwide.

Q Does the Principle of Extension bear a relationship to the policy of service to the local community, Mr. Pigman, and, if so, could you explain that a little more fully?

A Well, Rotary International is desirous of seeing Rotary in every community where there is reasonable certainty that a Rotary Club can operate and carry out its function. It proceeds from the premise that Rotary is a force for good in society and that it brings many benefits to a community.

The interest of Rotary International is the interest of extending the benefits of Rotary to the community and widening the number of units of the association, which is one of the principal vehicles in carrying out its objective of building international good will and understanding, because each new unit represents another possibility for people to be in contact across international borders.

Q Does Rotary International require a certain attendance policy on the part of the members of each local club?

A Yes. When a person agrees to become a member of the Rotary Club, he agrees to a number of conditions and one of the primary ones is that he must participate and get involved in the club.

The association worldwide has agreed that one of the best ways to get involved is to be there when the club meets and when it undertakes other service activities, so, insofar as the club's mandatory weekly meeting is concerned, a person may attend no less than 60 percent of the meetings in any given six-month period, otherwise he automatically forfeits his membership.

If a member, for one reason or another, misses four consecutive meetings of the Rotary Club, his membership is automatically forfeited.

This is a policy that is, in my observation, rather strictly adhered to by the clubs around the world. It, in my view, it is one of the key components in Rotary's vitality.

In Rotary Clubs that meet around the world each week, some 80 percent of the members are in attendance. Those that cannot attend are urged and thousands of them do each week visit a neighboring club and visit a club en route of their international or domestic travel, where, as a member of good standing of their own clubs, they are welcome to attend regular weekly meetings of any other club.

Q Does the requirement of a minimum amount of attendance and the privilege of discharging that attendance requirement by attending meetings at other clubs more conveniently held during a particular week result in a substantial amount of, I might call it, interclub participation by individual members?

A Yes. It is quite common for any Rotary Club, held reasonably near another Rotary Club, to have at its weekly

meeting one or more guests, excuse me, not guests, one or more Rotarians of other clubs attending that club for purposes of acquaintance and the interclub fellowship and to get the credit for attendance toward their mandatory attendance requirements and especially for Rotary Clubs which are on the travel routes of the world, the numbers of visitors could be not one or two, but in the tens and twenties each week.

Q Does a Rotary Club, local Rotary Club, have any obligation to accept as guests visiting members of other clubs in the makeup category that you have just described?

A Well, the procedures of the organization enable any members of any Rotary Club to attend, upon payment of his luncheon fee or meal fee, if there is a meal involved, and if the club wishes, the display of his membership card, identifying him as a member of the Rotary Club, to be a part of that meeting and participate in all of its functions.

Q Can you describe to us, Mr. Pigman, the essentials of what is done at a usual weekly meeting of the local Rotary Club?

A A Rotary Club meets each week, that is mandatory, and the usual pattern is as follows and takes place over a period of 60 to 90 minutes.

The members arrive and greet each other. Attendance is taken, usually in a written form or in some other form that verifies that they were there. In most countries they have a meal together and that could be a breakfast or a luncheon meal or an evening meal, a practice which developed because they found a meal time a convenient time to get together for their purposes.

The normal pattern then calls for announcements by the club leadership concerning service activities or community

reports or personal news about members of the clubs, people who may be ill, greetings from other clubs, visiting Rotarians are welcomed, persons who may have been invited to the club as a guest of a member are introduced and welcomed.

Sometimes there is a period in which there is a little information session about some of Rotary's objectives. There is almost always a program of 25 to 30 minutes' (sic) duration, usually consisting of a speaker or presentation on some aspects of Rotary's concerns, such as community service or international affairs and, then, there is adjournment, at which time most members return immediately to their place of business or profession or, if it is an evening meeting, they may go home.

Occasionally there will be a committee meeting that follows, because, again, that is a convenient time for all the members who are there.

To witness a Rotary Club meeting is, however, not to get a good view of what Rotary's purpose is or what it does, because Rotary is a service club. Its objective is individual and collective actions to help other people and this work, while it may be planned, in part, in a weekly meeting, usually takes place outside of and in addition to the weekly meeting.

Q Is a Rotary meeting at a local club open to the public?

A No.

Q You must either be a member of that Rotary Club or of another Rotary Club or be a bonified guest of a member of that club to participate?

A That's correct.

Q Now, I would like to move to a more specific examination of the concepts of service which, after all, is more or



less a central objective of why all these meetings and organizational patterns take place.

You are aware, Mr. Pigman, that this lawsuit places in issue the question of whether or not Rotary International is a business establishment, as that term is used by the California Unruh Act, and there are certainly some business establishments which are in the business of rendering service. When you mean service or when Rotary means service, is there a distinction between service as it is accomplished through Rotary on the one hand and service as it is rendered by a business establishment on the other side of the hand and, if so, would you describe that difference?

A Well, very definitely, there is a distinction. The word "service" used in context, used by Rotary and other service organizations, is not a term that is widely understood and it is, I think, subject to some misinterpretation.

The definition of "service" in this context, which comes closest, in my opinion, to what Rotary means by "service," and I quote here from my own Webster's dictionary, is:

"A contribution to the welfare of others."

Now, Rotary describes itself, in its formal definition, as a group of business and professional men united in worldwide fellowship, whose purpose is to provide humanitarian service in the context of "service" as I have just described, to encourage high ethical standards in all vocations and to help build good will and peace.

Now, the concept of "service" is given tangible expression in what clubs actually are doing. The Rotary Basic Library, which has been introduced as an exhibit, gives a worldwide view of the typical ways that Rotary Clubs interpret their objectives and translate them into concrete actions which



help other people and I have here a summary of specific service activities which relate to the area in question, which, if—

Q Let me—

A —you would like to see, they are in summary form.

MR. KENNEDY: Let me have these collectively marked as Exhibit D, the next in order, anyway, to this deposition and, then, I would like to give Mr. Smith an opportunity to inspect them and then we will go on with a description of it.

(Whereupon Defendants' Exhibits D and E were marked as requested.)

(Whereupon a recess was taken.)

MR. KENNEDY: Are we ready to resume?

Q Mr. Pigman, I will show you a stack of Xeroxed copies of various business records of Rotary and will you tell the Court what, in general, without getting into the specific content, what, in general, is the nature of these business records from which these copies were taken?

A These records are in two parts and they concern about six or seven Rotary Clubs, including the former Rotary Club of Duarte in the Duarte area. They comprise a summary developed by the leadership of the club itself, of its activities and its plans for the current year in all major areas of Rotary Club service.

It indicates their current membership status and how many members they expect to gain or lose in what categories in a year.

This summary of club plans and objectives is developed for and provided to the District Governor at the time of his visit and the District Governor is informed by this, and on the basis of this, is able to help the club with suggestions and

recommendations, provide them certain publications, which would help them achieve their own objectives.

The second part of each of these is titled the "Memo of Official Visit of the District Governor."

This is a report generated by the District Governor following his visit and it is a record of what he discovered on his visit and is a memorandum to himself concerning what specific ways he might follow-up and help this club.

This is a summary of club plans and objectives, is the sole document of its kind produced by Rotary Clubs each year and it is merely a mechanism by which the leadership summarizes and codifies what it hopes to achieve during the year.

Q Are these records prepared and forwarded to Rotary International in the ordinary course of business?

A Yes. The Governor immediately forwards a copy of the club summary to the office serving his area along with a copy of his memo of official visit, because our job is to help the District Governor in his task and help the club president achieve his goals.

This report is analyzed, both reports are analyzed and appropriate action is taken.

For example, seeing that the club is interested in youth exchange, we might, on our initiative or on the District Governor's own suggestion, send this club a pamphlet dealing with how to exchange youth from its community with a community abroad.

It is the chief mechanism by which we help the volunteer leadership of the association promote the aims of the association.

Q Now, specifically, you have—you searched, is it correct, you searched the records of Rotary International to

determine the most recent document of this kind from the plaintiff Duarte Club and that they are copies of those original documents taken from Rotary's files, a part of the packet of papers collectively marked Exhibit E?

A That's correct.

Q And for what years do you have reports from the Duarte Club?

A For the Rotary years 1970-71, 71-72 and 72-73, along with our records of their reported attendance and membership.

Q Referring to those records of the Duarte Club only, can you, for purposes of getting the Court a general description, based on Duarte's own records, of what kind of service activities they reported to Rotary International as undertaking during that period of time?

A Yes. I am referring to the summary of club plans and objectives, which was prepared by the then President of the Rotary Club of Duarte for the Rotary year 1972-73. They are reporting a club size, at that time, of 19 members, which would rank as of the smaller Rotary Clubs in our association.

They list, under "Vocational Service," that they plan to provide assistance and occupational information for students at Duarte High School.

Under "Community Service," they plan to provide volunteer workers for community recreation programs.

Under the category of "Community Safety," they report a student safety program assembly of some sort in December. They have student guests from the high school in Duarte and Mount Olive High School regularly to acquaint them with the aims of Rotary.

And, then, they plan specifically to participate in what they call a "career night," in which they plan to provide three professional people to assist and take part in the career night program at Duarte High School in the next year.

1971-72, the summary of club plans and objectives list, and these are typical Rotarian Club projects, under "Crippled Children":

"Money support plus group services will be rendered to this community service."

Unspecified as to detail.

They plan to establish a committee to examine community safety programs. Evidently continuing student guests. They are going to attempt to start an interact club in the community.

An interact club is a service club for young men and women, usually of secondary school age, which has the objectives of service to the community and international good will and understanding.

Under "International Service," the club reported they have established a committee with several persons who have traveled abroad to work on world community service.

World community service is a program in which a Rotary Club in one community, often an affluent community or in a developed country, attempts to help a Rotary Club in a developing country with a project or community need that may be beyond the resources of that community. Typically, it might involve a shipment of school books or medicines which have been gathered or a pump for a village well or whatever. It is one of the ways we try to promote international understanding through the tangible projects.

They also indicate they will support the Rotary Foundation and its programs.

And, in their final year, for which we have a record here—

Q What year is that?

A This would be the year 1970-71.

Q These years go from July through the following June, do they?

A That's correct. Their community service activity report, they are planning and organizing an overnight outing for underprivileged children at a mountain camp site. They plan to provide a scholarship for deserving Duarte High School seniors to one of the nearby colleges. They are going to provide an award for recognizing scholastic achievement for a junior high school student and they again say they are going to contribute money to the Rotary Foundation.

Q Now, in addition to the documents in Defendant's Exhibit E, relating to the Duarte Club, for the three years which you have just summarized, you have assembled documents of the same type for the year 1977-78 of certain other Rotary Clubs geographically adjacent or nearby Duarte as further examples of Rotary activity in District 530, have you not?

A Yes.

Q I show you Defendant's Exhibit D and ask you if the contents of that relates to these documents coming from adjacent Rotary Clubs?

A Yes. Exhibit D describes—

Q D?

A Exhibit D.

Q D as in David.

A D as in David describes the service activities of eight clubs in the vicinity of Duarte as reported by the clubs in the year 1977-78.

Q Was it prepared from information supplied on the correspondingly described documents in Exhibit E that you have just—

A Yes. This summary is based on the reported activities listed in the club plans and objectives.

Q Was it prepared under the direction of your office?

A Yes.

Q To the best of your knowledge, does it truly reflect, as a summary, the activities of these various clubs during the Rotary year 1977-78?

A Yes. This list of activities is quite representative of what Rotary Clubs undertake as community and other services around the world.

MR. KENNEDY: Counsel, at this point, I will, based upon that foundation, offer Defendant's Exhibit D in evidence.

MR. SMITH: We have no objection. However, we would like to have at least one other club added to that.

MR. KENNEDY: All right.

MR. SMITH: I don't know whether to do this on voir dire or wait until cross examination.

MR. KENNEDY: I would prefer that. We have no objection to your obtaining that further discovery, but for purposes of this part of the case, if you would stipulate that Exhibit D may be introduced into evidence and, then, we will, of course, give you an opportunity to pursue the other club. Is that agreeable?

MR. SMITH: We will agree. We have no objection to it being introduced.

BY MR. KENNEDY:

Q Now, getting back to the concept of a service club and comparing it with a business engaged in the providing of services, are the members of the Rotary Club, the recipients of the services which you have described?

A No. They are not the recipients of the service. They are the givers of the service.

Q Is there any discrimination by sex among the recipients of services given by Rotary Clubs?

A Not to my knowledge.

Q Bearing in mind the type of activities that you have orally recited with respect to Duarte and which Exhibit D summarizes, with respect to some of the adjacent clubs, do you have anything to add to how the Principle of Extension coordinates, is related to the carrying out of such services? "Extension" being the principle of individual local clubs, citing—

A As I said earlier, Rotary is desirous of expanding the number of member clubs in the association, because it makes the quite valid assumption that there is no single community, no matter how affluent or in any nation, that would not benefit from having within it a group of community leaders, such as are represented in a typical Rotary Club. Any club that is formed immediately begins to assess how it might help its community and the series of activities that are described in this summary are quite typical of the needs that clubs identify and take action on.

The stated policy of Rotary International in community service is to survey its community and identify the needs,



see if there is any current agency or group that is helping to meet the need. If none is available, to undertake to ameliorate the situation itself and once they get the ball rolling, they attempt to get out from under it as a club and leave behind some group or agency or efforts that continue to meet the needs, leaving the club free to go on to identifying another need and so forth.

This is the way clubs work worldwide.

Now, a club that comes together, is newly created, comes together and is admitted to Rotary on the basis that they agree that these are the objectives of Rotary and the only reason for their existence and, in the interchange of viewpoints that occur at a club meeting, and the presentations they hear, they begin to identify and hear about community needs that they might not have heard of through any other mechanism.

So Rotary fulfills a rather unique role in its community, if it is the only service club.

Now, there are other service clubs that have very similar function, but they are all designed to be a channel for individual or collective action by its members to meet community needs or the needs of individuals in the community.

Q Is the principle of classification, getting one member from diversion businesses, a principle that was selected because it reinforced the ability of Rotary to act as a service club or for other purposes?

A Well, that classification principle clearly is the reason today for having a good cross section of the membership. That was not the original purpose of the original club and there were, in those very early days of Rotary, as stated in our own official publications, a motivation of help to each

member, but as the organization evolved, very early in its life, it discovered that any component of help to each other or any component of business reciprocity was not an element on which you could build a service organization.

So the elements of service pushed aside all of those considerations and the record of Rotary documents this by official resolution, board policy and otherwise.

It's rather swift and clear move toward the concept that service means help to others and the principal motto of this organization, of course, is "Service Above Self."

Q With respect to the changeover of that policy of mutual help to help outside the Rotary Club itself, I refer you to Exhibit A, particularly the 1971 Manual of Procedure, page 138, and particularly the section titled "Commercializing Rotary," and ask you if that is one expression of the changeover or at least the existence of a present policy different from the original policy of helping each other?

A Yes.

Q Would you read that into the record?

A You wish me to read this entire statement on commercializing Rotary?

Q I wish you would.

A "The policy of Rotary with regard to business relations between Rotarians is that a Rotarian should not expect, and far less should he ask for, more consideration or advantages from a fellow Rotarian than the latter would give to any other businessman with whom he is in business relations."

"Further, it is contrary to a Rotarian's obligation toward his competitors and it is contrary to the principles of vocational service for a Rotarian to grant to a fellow Rotar-

ian (because he is a Rotarian) privileges that he would not normally accord also to others with whom he has business relations. True friends demand nothing of one another and any abuse of the confidence of friendship for profit is foreign to the spirit of Rotary."

"If new or increased business comes naturally to a Rotarian as a result of friendships which he has made in Rotary, that is a normal development which takes place outside Rotary as well as inside, and is not in any way an infringement of the ethics of Rotary membership."

Q There is a reference there to "board 33-34," would you explain that?

A Well, the board adopted this policy statement almost 50 years ago, 1933-34, upon expressions reaching it from, in this case, a European advisory committee, that this principle, clearly stated in this statement, was not or may not have been clearly understood by some individual members in Rotary and the board felt, by this means, it would make it absolutely clear that a membership in Rotary is not for your personal gain by any means.

Q Now, a substantially identical statement appears in the 1978 Manual of Procedure, page 166, am I correct?

A Yes. As far as I know, this is identical to the one that I just read.

Q Now, in fact, the board of Rotary has recently strengthened the 1933-34 statement, has it not?

A Yes, it has.

Q I refer you to the 1980 Manual of Procedure, page 154, and ask you if that reflects the most recent enunciation of that policy by the board?

A Yes. The item on page 154, entitled, "Commercializing Rotary," is the most recent statement of the board policy on the subject.

Q And the contents of that will speak for themselves, but just briefly, would you state in what particulars the statement has been strengthened?

A Well, it has been reduced in the language and, it's always a help, it specifically excised the paragraph which was the final sentence of the policy statement that I introduced into the record earlier.

In my opinion, because they felt it would further strengthen this statement and make this clear policy against personal gain subject to less misinterpretation.

Q Now, to turn to some, somewhat technical matters, Rotary International has a corporate form, does it not?

A That's correct. It is incorporated in Illinois as a not-for-profit corporation.

Q And individual Rotary Clubs form their association by taking membership in that not-for-profit corporation, is that correct?

A Yes. Well—

Q I am sorry, individual clubs.

A Please state your question again.

Q Yes. Let me state that again.

A Yes.

Q What is the relationship of the individual clubs in the association to the corporation entitled Rotary International?

A Well, the relationship of a club to the association is as a member of the association, entitled to all the rights and

privileges that are pertained to membership in the association and on the provision that it carries out all the obligations of membership to which it pledges itself upon admission.

The specific obligations are such things as payment of its financial obligations, adherence to the rules decided upon by the legislative mechanisms of Rotary, continuation of its functioning as a service club, meeting regularly and all the other specific agreements which are part of the admission documents in the Extension Manual.

Q Now, the second course of action in the amended Complaint is premised upon the theory that Rotary International is subject to certain provisions of the California State Constitution, and it is at least Rotary's contention, Rotary, the defendant Rotary, it is Rotary's contention that, at least for such a claim to be valid, there must be certain benefits from the State of California to Rotary International to, in effect, make Rotary International a state agency.

In the context of that, my summary of contentions, I would ask you the following: Rotary International, the non-profit corporation, has it formally qualified to do business in the State of California?

A No. Rotary International, as a corporation, is not qualified to do business in the State of California in that sense.

Q Has the franchise tax board of the State of California granted to Rotary International, the corporation, any tax exemption privileges?

A None whatsoever, to my knowledge.

Q There is a related organization, which is not exactly the same as Rotary International, the corporation that we have just been discussing, called the Rotary Foundation,

which I take it is described, at least generally, in each of these three Manuals of Procedure, under a chapter entitled, "The Rotary Foundation," correct?

A Yes.

Q What, organizationally and legally, is the distinction between the non-profit Illinois corporation, Rotary International, on the one hand, and this entity called the Rotary Foundation on the other hand?

A Rotary International is a not-for-profit corporation under the laws of the State of Illinois. Rotary Foundation is a trust operating under the Illinois state laws. The Foundation legally is described in several sections of the constitutional documents, the most descriptive of which is in Article 19 of the bylaws of Rotary International, beginning on page 297 of the Manual of Procedure.

Q This is the 1980 Manual of Procedure you are referring to?

A That's correct. Basically that article provides that the title to all property of the Foundation is vested in 13 trustees, who invest, manage and administer it and have the power to spend from the corpus or principal of the funds, in concert with the board and with the Council on Legislation or convention monies (sic) in pursuit of the purposes of Rotary International or the objectives of Rotary or any philanthropic, charitable, educational or eleemosynary purpose, object, movement or institution sponsored or approved by Rotary International.

In summary, it is the single foundation or mechanism by which Rotarians worldwide can fund international service activities which they agree have merit.

It is a foundation that has the stated operational objective of promoting friendly relations among people of different



nations and for principally the last—during the post-World War II era, it has carried out this purpose through the exchange of young people for educational purposes.

The Foundation is supported by the voluntary contributions of individual Rotarians and others around the world.

Q Now, am I correct that the Rotary Foundation qualifies as a charity under Federal tax laws?

A It qualifies as a tax-exempt institution under the Internal Revenue Code of the United States of America and for purposes of the State taxes and other things, it is exempt. Contributions to it are exempt.

This privilege is enjoyed by contributors of, I think, two other nations.

Q Am I correct that Rotary International, the non-profit corporation, does not enjoy such a charity status?

A No. It does not.

Q Now, Rotary International receives dues from the individual and local clubs, is that correct?

A That's correct.

Q And how are those dues measured?

A The dues are uniform worldwide and a club is obligated to pay Rotary International annually the sum of \$17, U.S. or equivalent, for each member on its rolls as of a certain date.

Now, in practice, the per capita dues are paid on a semi-annual basis, but the principal is a specific amount of money for each member of the club as of a given date, specifically, July 1 and January 1.

Q Now, in addition, individual Rotarians pay dues to their local club, is that correct?



A Yes. At a level prescribed by the club bylaws.

Q Do individual Rotarians pay any dues directly to Rotary International?

A No.

Q Is it a condition of being a Rotarian that one make any contributions to the Rotary Foundation?

A No.

Q Now, I believe I correctly understood your testimony to be that, some time ago, that the Legislative Council, as described in these various documents, is the sole body for enacting an amendment to the constitution of Rotary, is that correct?

A Yes.

Q Subject, I take it, to maybe—do you want to describe that process a little more particularly?

A I want to correct my answer. Council on Legislation has this authority, as does the Convention of Rotary International.

Q This lawsuit contests, as you know, the validity of the provision in the Constitution of Rotary International and the corresponding provision in the required constitution of each local club, that all of its members be, all individual Rotarians be male.

Has that principle been re-examined in recent years by the Council on Legislation and, if so, would you describe the occasions and what transpired?

A Yes, it has. As I stated earlier, any member of the association, may propose an enactment that would serve to change the membership provisions and that has happened from time to time.

In 1972, a proposal to eliminate the male only requirement was debated by the Council on Legislation and was not adopted.

It came up again in 1977, proposed by, as I recall, four different proposing agents. It was debated by that world representative body and did not acquire sufficient number of votes to make that change.

The most recent episode, in which it was examined, was the 1980 Council on Legislation, when it was proposed by 11 Rotary Clubs and two districts from four different countries and, by the Board of Directors of Rotary International itself, the board sensing its members, that this was an issue of considerable concern to many clubs in the association, felt that this was an issue that should have thorough examination by council.

The debate took place at the 1980 council for a period of three hours and, as described in the report of that meeting, in the official magazine of this organization, August, 1980, it was reported that 39 representatives from 13 different countries commented on the pros and cons of the issue.

After this debate, there was a standing vote requested, which the chair, chairman, without a specific count, declared the motion was lost by the approximate percentage of 60 to 40. It requires a two-thirds majority of the delegates to the Council on Legislation to change the Constitution of Rotary International.

MR. KENNEDY: I would like the issue of The Rotarian of August, 1980, a copy here, to be marked Defendant's Exhibit next in order.

(Whereupon Defendant's Exhibit F was marked as requested.)

BY MR. KENNEDY:

Q I refer you to the article, starting on page 12 in the magazine, is that an official report of the Legislative Council transactions regarding the male only provision of the constitution?

A This is a report intended to adequately inform the members of Rotary Clubs worldwide. It is not the official report of the council. There is a formal report that lists all the council action and is sent to each club for its action following the action of the council, but, in terms of describing the debate on this issue, this represents an authoritative report of the issues debated.

MR. KENNEDY: Counsel, I will move, at this point, to introduce that portion of Exhibit F, comprising the August, 1980 Rotarian, and the description of the parliamentary proceedings that occurred respective to this issue.

Q Mr. Pigman, I am going to ask you for some evaluations of the impact on Rotary of certain things in a minute, but I would like to, before getting to that, to focus on one particular issue and, that is, is fellowship an important factor in Rotary's activities, particularly as a service organization?

A Yes. It is a very important factor. I would like to comment on that in two ways.

One is, to quote from the object of Rotary:

"The object of Rotary is to encourage and foster the ideal of service as a basis of worthy enterprise and, in particular, to encourage and foster:

"First. The development of acquaintance as an opportunity for service."

Fellowship and the camaraderie and ease of relationships that develop among a group of men that meet each week is an important component to their effectiveness, because they feel comfortable in discussing community issues and other community concerns with each other.

I think that there emerges, from this kind of relationship, many insights into the communities that might not otherwise be afforded to an individual. The fellowship has this impact on the community, as far as carrying out services.

On a broader scale, one must realize that a Rotarian can walk into any Rotary Club, in any country, and feel quite at ease participating in that meeting, knowing that represented in that group of men, whether it is in Tokyo or Bombay or Buenos Aires, a group of men who share, like he, a very similar group of concerns, whether it is vocational efforts or interests in the community or whatever.

So the fellowship is much broader than just the local fellowship. Rotary is a worldwide fellowship and, particularly as the world has developed in its communication, travel has increased dramatically, this is becoming an increasingly important dimension of the organization.

Q Mr. Pigman, the Unruh Act in California has very recently, in the case of Marina Point vs. Wolfson, reaffirmed earlier rulings, notably in a case in *Re: Cox*, that an organization which is found to be a business establishment must refrain from substantially all arbitrary discrimination among its patrons and customers. It is not just limited to omitting women. Exactly what the limits are, we needn't get into, but they go beyond, substantially beyond just being limited to taking in women. It is, to a first approximation, the law of the restaurants, which must serve anybody who walks in and is prepared to pay for a meal.

If it were found that Rotary International is a business establishment with respect to the applications of clubs for admission to the association, what would be the impact on Rotary International of such a ruling.

MR. SMITH: Objection. The witness is in no way qualified to make a conclusory statement based upon the evidence that we have before us. We are asking the witness to draw a conclusion as to what might happen in the future.

I think all he is really entitled to testify to are the facts that already exist or the facts of which he has past knowledge.

BY MR. KENNEDY:

Q The question will be interpreted as being based upon facts of which you have knowledge in your capacity as General Secretary of Rotary International and in connection with your period of exposure to Rotary International, of which you previously testified to.

A When I think, in my own mind, of what represents the services of Rotary, as they may be provided to the general public, in no way can I equate those with the services that might be provided by a retail establishment or place of public accommodation.

The principal difference being that nothing is expected in return in providing of the services and if the Rotary is construed to be in the business of providing services, charitable services, Rotary makes no discrimination or distinction between the object of its services.

Q I am speaking now of a finding which would hold that Rotary is a business establishment with respect to its member clubs, and I ask you—so that, essentially, it could impose a very limited choice on the qualifications of those

clubs to be admitted to the association called Rotary International.

I would ask you to address your answer to the impact on Rotary of that kind of loss of discretion in the selection of membership.

A Well, I don't understand that question. You will have to rephrase it in perhaps several parts.

Q All right. Let me give you an example. Suppose Rotary, as a result of this ruling, that Rotary International was a business establishment with respect to its members, as a result of that, Rotary International could not dictate the terms of the standard constitution to which all member clubs must subscribe; what would be the impact on Rotary International?

A Well, if Rotary International could not impose, as a condition of membership, on unit members, certain procedures, rules and regulations that it devises, then I think there would be a negative dilatorious effect on the association.

I think that service activities would diminish. I think that there could be a resulting loss of membership and the association might be less effective in reaching its objectives. I can illustrate that, if you wish.

Q Please do.

A If Rotary were not able to enforce certain rules that have been agreed upon worldwide, it would, I think, begin to disintegrate as an association.

Let us take the classification system previously cited, the principle of being able to ascertain community needs, to have a cross section of the community leadership.



If all the rules did not prescribe classification membership, then clubs would be free to ignore it and it could be quite possible that a few vocations could dominate and we would lose this component which, in my opinion, has served the organization very well.

If clubs were permitted to capriciously cancel meetings or to meet irregularly, it would have a poor effect on the matter of attendance, make-ups, interclub fellowship, the ability of any Rotarian to go to a meeting place at a particular time and day with assurance that the club would be meeting.

If attendance were not enforced, then the standards of any particular club could relax to the extent that membership in the club would become meaningless in terms of participation and involvement.

If Rotary International were not able to constrain clubs in certain policy areas, there could be misuses and abuses of that club's membership in the association. Clubs or individuals in clubs might try to promote a particular political or economic viewpoint. Clubs might badger other clubs to help them with their fund raising projects to the annoyance of clubs worldwide. Clubs might engage in activities which might be perfectly acceptable in their countries, but not looked upon with favor in other countries. Clubs could pass resolutions that take sides in hostilities among governments in political matters.

Rotary Clubs are presently constrained in their capacity to do that. If a club didn't meet its financial obligations to Rotary International, under the rules agreed upon, the results would be obvious.

If a club decided that it would become something less than a broad base service club, I think that would have a definite impact on the organization and probably not to the good.



Rotary Clubs enjoy a substantial autonomy in carrying out the stated objectives as a Rotary. They come into the association with a definite written commitment that they support the principles and objectives of the organization. When an individual member pays his dues, by the paying of his dues, he agrees to the principle and objectives of Rotary.

Now, that kind of commitment causes clubs to examine their purpose and their functions in light of those objectives and, because of this, activities result from the kind offered in Exhibit D and, furthermore, because many clubs learn about ideas through the clearing house of information, which this office represents, ideas transmitted through publication, there comes to exist a number of programs that are very beneficial to communities and world peace, which might never come to pass if clubs became narrow, single interest type clubs.

For example, because many clubs are interested in exchanging young people to countries overseas, Rotary International has been able to create one of the largest and most effective programs of youth exchange.

Because Rotarians voluntarily contribute to the Rotarian Foundation, the Rotarian Foundation to date sponsors a global program which provides educational awards for young men and women to study abroad and serve as ambassadors of good will.

Because Rotarians voluntarily subscribe to an effort to combat new traditional problems in countries, health problems in countries, we have programs supported through voluntary efforts in 20 different major problems on four different continents.

These are all evidence that an organization that tries, through the extent you can do this through voluntary association, to make a club continuously examine its purpose and

activities, results in activity of great benefit to communities locally and to their nations and to the inter-relationships among nations.

Without rules of this kind that are enforceable, it is my view, that a Rotary Club or its service club could be diminished in its importance, both in the eyes of its known members and its ability to work effectively.

In summary, Rotary requires that its clubs reach out and examine genuinely how they are going to serve and it does that through a system of service which is as comprehensive in interpretation of that word as you can imagine. It is the antithesis of any narrow or single service type, but appeals to its members, because it has something for all its members in terms of interest.

Q Now, that question was directed to the concept of loss of selectivity at the Rotary International level and the qualifications of the club members. I would like to transfer the attention now to individual membership in local Rotary Clubs and ask you, based upon your background with Rotary International, what would be the impact on the function of Rotary by a ruling that the individual club was a business establishment with respect to its individual members and thereby lost most of its privileges of selecting those members?

A Well, membership in Rotary Club is based on classification and it is based on invitation. If there were a ruling made that Rotary's classification system was not permissible, it would have a very negative effect on the organization. It would be in opposition to what the organization considers as a key component in carrying out its objectives.

The ability to gather weekly and have communication among community leaders, who have a broad knowledge of the community needs, who have no collective axe to grind,

who represent all races and religions, businesses, professions, if that element of Rotary were declared invalid, it would have a very serious effect on one of Rotary's most cherished and traditional and valued membership provisions.

Q Now, we have been focusing on the broader concept of general lawsuits, selectivity as it were, the imposition of the selectivity of the coffee shop upon membership, but I would now like to narrow your attention to the specific issue being challenged here, the male only provision, and ask you, based upon your background and experience in Rotary, what would be the impact on Rotary of a ruling prohibiting the organization from enforcing its male only constitutional provisions?

A Well, the male only principle of membership is a provision that is valued in my observation by a very substantial majority of the members of Rotary Clubs worldwide.

I make that observation based on my own observations, the travel in all parts of the world, on information reaching me through correspondence and minutes and publications of the Rotary Clubs, et cetera, but probably most definitively, by the character of the debate and the vote itself on the Council of Legislation, the issue has come before the association on three different occasions in the last decade and it has failed to acquire the necessary votes.

The organization is more than 75 years old. It has a set of rules and traditions and procedures which have been developed through democratic process, which have been the product of the best thinking of the representatives in these clubs worldwide over this entire period.

It is a conservative organization for this purpose, because Rotary International, as an association, tries to cooperate with rules and procedures that are acceptable to the total worldwide association and however desirable or otherwise a

particular rule or provision might be in a particular region or in a particular state or area, the decision by the worldwide legislative body and its convention have always been what is in the best interest of the association to help carry out its ultimate objective of service.

There is a historical basis for the male only provision. It was founded in 1905 on the basis that this would be an organization of service comprising business and professional leaders. In the society of America, in that era, there were very, very few women in positions of business and professional leadership at that time.

Furthermore, in American society, my own reading of history, there were relatively few organizations that brought together men and women for any purpose, but especially purposes that had such a strong component fellowship.

Now, the male only provision was a material part of those first constitutions. There is no record, in my knowledge, that those early founders of Rotary ever considered the matter of having women in Rotary, so it continued that way for many years and society here began to evolve, but that became one of the provisions, one of the rules, which, like many others, become part of the tradition and practice and, as they get years on them, they are not easy or subject to change, unless those changes meet with the approval of all the members of the association.

Then, as Rotary grew to countries with other cultures different from those of the Western hemisphere, it grew into cultures where the role of women was vastly different from the emerging role of women from societies where Rotary was born.

So, masses of changes in this became more complex, not less complex and why is this? Because Rotarians have tried to agree on a set of rules acceptable to all the components of

its organization. It is one of the few organizations, to my knowledge, that have been able to operate in such a way on a worldwide basis.

They have always sought those aspects which they could have universal agreement on. They have agreed to avoid those aspects on which there would be serious division, serious enough that it would be a detrimental aspect in enabling the organization or its unit clubs to carry out its objectives.

This general operating policy of Rotary International is one of the key reasons for its success and growth. It has enabled the association to keep open doors of communication, many, many, many areas of intercountry communication, where those doors have been closed to other associations that have been less broad in their motivations and objectives.

They view themselves as a family worldwide and they do those things that help the whole family progress. They try to avoid the areas where serious disharmony would be harmful to the organization and they feel this is very important if they are going to have any effect as a non-political, non-governmental force in meeting peace among nations.

In the Council on Legislation debate, which is described in the August, 1980 issue of *The Rotarian* magazine, there are enumerated there the principal reasons as stated by Rotarians for and against the issue of women in Rotary.

One of the expressions of concern against inclusion of women at this time concerns that aspect of fellowship within the individual club or the camaraderie that is enjoyed by the present male membership of the club. It is my opinion that this is an area which members of Rotary and, I dare say, which members of any organization, would find difficult to verbalize. It is an area—



Q Difficult in the sense of reluctant?

A To speak about, reluctant to speak about, because it is an area that they feel deeply about and they realize that there is a—in a companionship of fellow club members, there is a certain ease of communication which enables them to carry out service and this particular chemistry exists and they probably don't know quite what would happen if the chemical formula were changed in any way and what would happen to this acquaintanceship and fellowship, would it be changed in a way that they can't discern? They don't know and thus they are reluctant to talk about it.

So I can only say, in this area, which is subject to a lot of conjecture, of course, that they feel that Rotary's effectiveness and service objectives might be somehow jeopardized if the change were to come before they feel they are ready for it.

Now, Rotary has always been operated on rules that it has agreed upon internally. To my knowledge, its rules and regulations are not illegal in any jurisdiction, in any country, in which a Rotary serves. It is difficult for me to conjecture or discern what might happen to Rotary International if its ability to agree upon its own rules of procedures were to be dictated by decisions, forces external to its own operations. It has not faced that. It has been able to operate worldwide and I think it is one of the very few organizations that has been able to do this and, to its credit, it has and it has continued to agree worldwide.

Q Let me just pick up a few stray pieces of business that were not covered earlier. When we were speaking of Rotary International, we spoke about tax exemptions for charitable purposes given to the Rotary Foundation. To your knowledge, has the State of California granted charity status to the Rotary International Corporation?

A No, not to my knowledge. It has not granted charity status to Rotary International.

MR. KENNEDY: Mr. Smith, we discussed earlier that it would be unnecessary for Mr. Pigman to go through the various specifics of how Rotary Club of Duarte was notified of its impending expulsion unless it removed its women members and we have not gone into that on a mutual understanding, which I would now like to make a formal stipulation that none of the plaintiffs claim that there was any violation of the rules and procedures of Rotary International for the processing of that dispute, is that correct?

MR. SMITH: That's correct. We so stipulate.

MR. KENNEDY: On that basis, I will not ask Mr. Pigman to go into the details of what was done and that is also understood, correct?

MR. SMITH: That's correct.

MR. KENNEDY: If I may just have a minute.

All right. Your witness, counsel. You want to take a brief break?

MR. SMITH: Why don't you take five minutes to allow you to catch your breath.

(Whereupon a recess was taken)

### CROSS EXAMINATION

BY MR. SMITH:

Q I would like to remind you that you are still under oath. We will have the same rules in regard to the objections also. Any objections that need to be taken, need to be taken down.



I would like to follow, to the best of my ability, roughly, the sequence that Mr. Kennedy was following, although, I am not as well organized in cross examination as he was on direct, but we will try and make it coherent for you.

In terms of membership policy, could you describe the various classes of membership that exists for Rotary International?

A Yes. Well, there are four kinds of membership in a Rotary Club. They are called active, senior active, past service and honorary.

Q What are the qualifications for each class of membership?

A Qualifications are described in the constitutional documents for membership in a Rotary Club. These are described in Article Four of the Constitution of Rotary International and they describe the essential qualifications of membership for all those first three classes of membership, honorary membership has a different set of qualifications.

Q Do all of the four classes of membership require that one be a male?

A Yes.

Q Do any of the classes of membership allow people to become members, who are not active or have been active in a business or profession?

A Would you state your question again, please?

Q Do any of the classes of membership allow a person to become a member who has not been active, now or in the past, in a business or profession?

A I am sorry. You will have to state it again. The way it is stated, I want to be sure of my answer to that.

Q Let's go through it then in each case.

A Okay.

Q Now, in order to become an active member, must one be presently employed in a business or profession?

A Yes.

Q In order to become a senior active member, must a man, either be presently employed in a business or profession or have been employed in the past in a business or profession?

A Yes.

Q Is the same thing true for past service?

A Yes.

Q And is the same thing true for honorary member?

A No.

Q Are these all spelled out in Article Four of the constitution?

A Article Four describes active membership and the bylaws of Rotary International provide for kinds of membership in addition to active membership, those being senior active, past service and honorary and qualifications are described in the bylaws and those are described in Article Three of the bylaws.

Q I understand from your testimony on direct that the Extension Manual No. 8101 sets forth the rules and the forms, essentially, that must be completed in order to become a Rotary Club. How does Rotary International monitor Rotary Clubs, once they have come into existence, to ensure that they are indeed following the rules of Rotary International?

A Rotary International does this by several means, with one or two exceptions representing isolated geographical clubs. All clubs are members or are identified as being part of a district and the rules provide that each club be visited annually by its District Governor.

A District Governor receives the summary of club plans and objectives from the club and meets with the club President and Secretary as part of his official visit.

The second part of the official visit concerns a meeting with all the club committee chairmen and the third part represents an address to the club.

In the first two parts of this meeting, his opportunity to ascertain the extent to which clubs are meeting their obligations, Rotary International informs the Governor if the club has met its financial obligations.

Each club must report to its Governor its attendance for the week and the Governor must include this in his monthly letter, which is his official monthly publication.

Each new member, which is brought into a Rotary Club, is reported to the District Governor and to the office of the General Secretary.

Those are the basic means, plus review of the club's progress by a member of my staff of the same reports that the Governor gets.

These are the basic means by which we monitor a club's compliance with its constitutional documents.

Q To the best of your knowledge, have any clubs, that have not yet been formed, been disallowed from being chartered for any reason that might be included in Manual 8108?

A Yes. At any given time, there would be underdevelopment worldwide the groups of men who become the nucleus of Rotary Clubs. When a sufficient number are gathered together and begin to meet weekly, they achieve a status of professional Rotary Club. This process of developing a new club normally takes anywhere from two to five months. This amount of time is required for the club to meet its conditions.

A typical reason for delay in admission is the club failing to produce, with the aid of the Governor's special representative, a satisfactory list of charter members who must satisfy the conditions of separate and district classifications and kind of memberships, all of which are described.

If a club does not meet these provisions, they are not admitted to the association.

Then, following its admission, the monitoring that I have described takes place and the club that assisted the Governor and serves as the new club's sponsor club currently is required to provide to me, not less often than quarterly, a report on its own efforts to help monitor the club.

Q To the best of your knowledge, how many clubs have been disallowed within your tenure as General Secretary?

A That is a very difficult question to answer, because most clubs that would be in danger of being disallowed usually eventually comply. It would tend to extend the formative period. The procedures of this extension in Rotary are regularized to the extent that each step must be satisfactorily completed before the next one is taken and there are undoubtedly countless instances in which District Governors or their special representatives have formally surveyed a community and found that the conditions did not exist for Rotary there. Therefore, they would go no further and no report would come to me.

On the other hand, those clubs that have been admitted and have been in operation occasionally are terminated for failure to function.

Q When such a termination—where would it originate?

A A termination of an existing club originates usually in one of two ways. It is a decision by the club itself to resign, because its members themselves feel that they are unable to function under the original conditions of their admittance or there would be an evaluation and recommendation of the officers of Rotary International, the District Governor, usually in concert with the group itself.

The reason for termination of failure to function, inability to meet the financial obligations, inability to sustain a membership with qualified persons in the community and it is often the product of a community itself that has withered away for economic reasons.

Q Therefore, have any clubs been terminated as a result of action initiated, either by you or by the Board of Directors?

MR. KENNEDY: You mean, ever in the history of Rotary or during any particular time period?

BY MR. SMITH:

Q During any time period of which you have knowledge, aside from the obvious case or the instant case.

A I would say, yes to that, although, I am not in a position, without research, to describe the specific instances.

In a typical year, 20 to 30 clubs would be terminated. The most recent example, of which I have personal knowledge, would have been a board decision to terminate Rotary Clubs in a country for failure to function, because they weren't able to function, because of the conditions of that country.



Q Along with the study on the classifications that are available, once a club wishes to be formed, is there any minimum population base criteria that are used to determine whether or not a club can continue to function in a community?

A The club may only be admitted if it has a minimum of 20 members. Once it is admitted, there is no lower limit stated in our documents, nor is there any upper limit.

In practice, the board has developed a policy, which represents a kind of early warning system or level and they have set that level at 20 and the policy says that, in any month in which the membership of a club drops below 20, that the District Governor is asked to contact the club and see if it has any particular problems and seek to help it.

The clubs in Rotary average 50, range from fewer to 20, as I said, to 900 in one instance.

Q If the club consistently remains below the level of 20 members, are there any further steps taken than simply the reports by the District Governor?

A Yes. There are further steps taken, but no steps that would be construed by the club as putting its membership in jeopardy. Every attempt is to help the club to the extent that the qualified people are available in the community to do several things, to resurvey the community and to determine the actual membership potential, to examine its service program and make sure it is appealing to potential members, to look at its public relations, to see if the understanding of potential members is adequate, to see if there is any other negative influence that would cause the club not to succeed.

Size has never been the determining factor for the effectiveness of the Rotary Club by policy or otherwise, because conditions that create low membership can always be re-

versed or frequently can be reversed. The Board of Directors, nor the convention, has never held a policy that would tend to dismiss a club merely because it happens to be at low ebb. There is ample evidence that these clubs can come back in membership and activities and there is ample evidence that even a small club could be very effective in the purpose of Rotary.

Q And, in regard to interclub participation, you are asked about what obligations a host Rotary Club has to visiting Rotarians. To the best of your knowledge, are there any instances where countries or individual clubs, due to the particular circumstances of where they are located, have refused to permit visiting Rotarians to have meals with them or gain membership or gain attendance credit with that particular club? For example, until recently, have black Rotarians been allowed to make up at the Rotary Club at Birmingham? Are black Rotarians allowed to make up at Rotary Clubs at South Africa?

MR. KENNEDY: I object to this as being irrelevant, but you may answer.

THE WITNESS: I know of no, to the best of my knowledge, no incidents in which a Rotarian of any club has been refused participation in a Rotary Club anywhere in the world.

Now, I will amplify that by saying that sometimes Rotarians, like citizens of any country, are constrained to travel to certain countries by their own governments and certain policies, but that is an aspect completely outside of Rotary and beyond their control. Once they are out of the country, I have never heard of any episode that has happened or in any way have they been made to feel unwelcome.



BY MR. SMITH:

Q In regard to a policy that is set forth on commercializing Rotary beyond the statement in the Manual of Procedure itself, does Rotary International or, to the best of your knowledge, do District Governors do anything to bring home this policy to the individual Rotary Clubs?

A Yes, they do. I think I would cite as evidence of that the official directory of the organization. The purpose of this directory of all the club worldwide is to enable it to contact other clubs in the work of their fellowship.

MR. KENNEDY: Are you reading that from something?

THE WITNESS: Yes. I am quoting from the inside cover, this text titled, "Important," and here is a caution, "Authorized use of the directory":

"Rotarians shall not use the official directory as a commercial mailing list or make it possible for anyone else to use it for that purpose."

Rotary International, which has a list of all of its members, does not make that list available to any commercial concern. District Governors who publish directories perhaps of the leadership in their own district, frequently have, within that directory, cautions and policies stated similarly and it is quite common for a Rotary Club, which might publish a roster of its members, to have a similar warning against its use for any commercial purposes.

In addition to that, many Rotary Clubs have, in their own bylaws or policies, specific provisions that constrain any member from using the listed members to his commercial advantage.

BY MR. SMITH:

Q Does the official directory have amended to it a listing of hotel facilities?

A Yes, it does.

Q And do some of the hotel facilities indicate whether or not the owners or proprietors are themselves Rotarians?

A The basis of a hotel listing in the official directory is that the hotels listed are owned or operated by Rotarians or are hotels that are the meeting places of Rotary Clubs.

Q Do some of the listings indicate specifically that the owner or the operator is a Rotarian?

A Yes, they do.

Q Has the question of whether or not that constitutes commercializing ever been addressed by the board or by your office, to your knowledge?

A The question undoubtedly was addressed by the board and/or was considered to be not a violation of Rotary's policy against commercialization, because they include this list of hotels and, particularly, those that are the meeting places as a convenience to Rotarians who travel and to encourage them to have knowledge of where Rotary meets and where they can make contact with Rotarians while they are abroad for purposes of interclub fellowship.

Q Thank you. Going back to the question of the enforcement of Rotary's own policy and existing clubs, to the best of your knowledge, has any club ever been expelled for failure to maintain diversification of classifications?

A To the best of my knowledge, that has never been the exact stated reason for a termination. One could infer that that was a condition of any club that dropped to a membership level, whereas diversification represented only that

diversification in the number of members, whether it is four or five or six, but that would have been a subordinate reason to the basic reason.

Q Have you ever been informed of any clubs that are meeting on an irregular basis, either throughout the year or at certain seasons of the year?

A In any instance where a club is brought to our attention that it is not meeting regularly, we take action to inform the club of its obligations and notify the District Governor.

Whenever a club asks for interpretation of the rules on whether or not the cancellation of the particular meeting is a valid one, we, to the best of our ability, advise them on what is the appropriate action.

There are a few occasions which, for particular cultural conditions, clubs may not meet regularly in a particular month and I refer to the Islamic community's month of Ramadan.

Q If a club were meeting twice a month year round, would that club logically be subject to expulsion?

A Yes. It would, unless it was not operating under the standard club constitution.

Q Speaking of that question, when did the standard club constitution come into existence?

A In June, 1922.

Q And about how many clubs are operating under constitutions that predate that?

A At the present time, about 75.

Q Are the clubs in Great Britain and Ireland, in general, operating under standard constitutions?

A The clubs in Great Britain and Ireland operate either on a standard club constitution, which is prescribed by the territorial unit, or there may be one or two instances in which clubs admitted or formed prior to 1922 still retain their original constitution and may deviate in some aspects from the standard.

Q Aside from the Birmingham Club, are there any clubs, that are pre-1922 clubs, that have any restriction on membership that does not exist in the standard club constitution?

A Not to my knowledge.

Q To the best of your knowledge, are there any clubs that have an age restriction on the constitution above that age restriction which exists in the standard constitution?

A There is no age restriction in the standard club constitution.

Q Are there any clubs, that you know of, that have an age restriction of, say, 40 years minimum in their own constitutions?

A Forty, that is a person must be 40 years of age or more?

Q The minimum age of 40 years.

A I know of no club that has such a restriction.

Q Have any disciplinary steps been taken against clubs for advocating particular political viewpoints with other Rotary Clubs or with Rotary members?

A Yes.

Q Would this apply, by any chance, to clubs in Taiwan?

A The disciplinary procedures of Rotary involves several steps. This office or any office, International is made aware

of activity of a club that is in violation of a standard club constitution, such as propagandizing on an issue, the club is asked to, reminded of its obligation under the constitution and it is told to cease and desist.

Q Was your office or the board made aware of a letter circulated by members purporting to be representing the various Rotary Clubs of Taiwan, requesting American Rotarians to get in touch with their local political representatives to seek to block U.S. recognition of China Mainland?

A Yes.

Q Was any action taken by the Board of Directors that could be called disciplinary in regard to that letter?

A I cannot personally vouch that it was done, but I would have no doubt that the procedure that I described was invoked in that instance, either by means of direct letter from this office or the President or through the District Governor.

I would have to check the records.

Q To the best of your knowledge, prior to 1922, was there any other restriction on membership, aside from the male only restriction, in the constitution of the various Rotary Clubs? —

A I don't know if prior to 1922, whether the association agreed that it would adopt a uniform code. There were a variety of constitutions that had emerged. I believe there must have been about a thousand clubs in the association at that time and there were a variety of membership provisions and so forth. I am just not a sufficient student of history to know what restrictions may have been at that time.

Q In the 1922 constitution, was there any restriction in regard to race or religion or any other characteristic aside from sex?

A No. Not in the standard club constitution, no. There was no restriction.

Q To the best of your knowledge, in the original constitution for the Chicago Club, was there a sexual qualification provision?

A Would you say that again, please?

Q In the original constitution for the Chicago Club, was there any restriction explicitly on membership being available to males only?

A I don't know.

Q Do you know if there were any clubs, prior to 1922, that did not have restrictions on the basis of sex in their constitutions?

A Not to my knowledge, no.

Q Is there a provision in Rotary's articles or bylaws stating that, in the event that a particular provision of the articles and bylaws is contrary to a local law, that that provision be waived?

MR. KENNEDY: Off the record.

(Discussion off the record.)

MR. KENNEDY: Back on the record.

THE WITNESS: The bylaws of Rotary International, under Article One, Section 2D, appearing on page 248 of the 1981 Manual provide that, and I quote:

"Under exceptional circumstances or where necessary to comply with the laws and customs of any nation, state or province, the board may, at any meeting of the board, by a two-thirds majority of the members present, approve provisions in a club constitution which are not in accordance with the standard club constitu-



tion and amendments thereto, so long as such provisions do not contravene the provisions of the constitution and these bylaws."

There are only two instances, to my knowledge, where that has been applied, there may be others. One involved a constitution of a Rotary Club in Thailand, where the law of the nation required that the constitution of every free association had to state that it was not organized for political purposes.

MR. KENNEDY: May I voir dire on just that point?

#### REDIRECT EXAMINATION

BY MR. KENNEDY:

Q Do I correctly understand that provision to mean that, if a legal law required the admission of females, that the board would not be authorized, under that provision, to waive the modification?

A That is a correct understanding, because it is very clear that they may only approve a provision which does not contravene the constitution bylaws.

MR. DAVIS: It doesn't refer to local law, it refers to state or province or nation, not to community or country or anything else.

#### CROSS EXAMINATION (Resumed)

BY MR. SMITH:

Q Then, I would understand that to mean that, in South Africa, none of the constitutions there could have a racial ban, none of the club constitutions could have a racial ban?



A The law of the association is that if any Rotary Club has within it a restriction based on race, that it is null and void, without effect.

Q Let me ask you a couple of questions. In your role as a member of the Evanston Rotary Club, do you pay for your own meals at the Evanston Rotary Club?

A Yes.

Q And do you take a deduction on your taxes for the meals as a business expense?

A No.

Q Do you take a deduction on your taxes on payment of dues as a business expense?

A Yes.

Q Do you know what the majority practice is of the members of the Evanston Club, in terms of their treatment of dues and meals, expenses on their tax forms, just by your conversations with them or by rumor?

A No, I don't. I have never discussed that with any member of the club.

MR. KENNEDY: Mr. Pigman, is it a condition of your employment, as General Secretary, that you be a member of a Rotary Club?

THE WITNESS: Yes. The General Secretary must be a member of a Rotary Club.

BY MR. SMITH:

Q To the best of your knowledge, has any other Rotary Club been expelled from the Rotary Club by the Board of Directors, besides the Duarte Rotary Club?

A Yes.

Q What were the grounds for the expulsion?

A Well, in the past year, I would guess the record would show that approximately 25 Rotary Clubs have been terminated in Rotary International for a variety of reasons. The principal reason would be failure to function with all that implies. There may have been one or more which failed to meet its financial obligations, a club that does not meet its financial obligations is subject to termination at a specified date.

Q Of the 25 clubs that terminated, how many of them were terminated as a result of action by the Board of Directors to which the club itself was opposed?

A I am unable to answer that on the basis of my memory.

Q Would you give a rough approximation?

MR. KENNEDY: I object unless it is something more than speculation. He can answer.

THE WITNESS: Well, the vast majority of them would be termination upon recommendation of the District Governor, without objection by the remnants of the club.

BY MR. SMITH:

Q In reference to the memo of—the official memo on the Rosemead Club, could you give approximate numbers as to the number of members in the clubs that had been cited in Exhibit D and also the Rosemead Club?

A Well, Exhibit D includes, I think, eight clubs and do you wish to know the membership of the Rosemead Club in this particular year as opposed to the membership of other clubs?

Q Yes.

A All right. The Arcadia Club, let's see, reports as of the 30th of June previous 123 members; the Covina Club, 100 members; the El Monte Club, 64; the Monrovia Club, 68 members. The Rotary Club of Montebello reports 32 members; South Pasadena, 68. Duarte reported 17 in 1972. Rosemead reported, as of 30, June, 1977, 15 members.

Q Would your expectations as to the degree of club activities be related, at least in part, to the number of members the club has?

A In my judgment, I have not necessarily found a correlation between the number of service activities undertaken by the club and the size of its membership. If anything, there is a tendency for the larger club to have a more diversified program and perhaps the individual projects are larger in scope, that's my observations.

Q Does the report on the Rosemead Club appear more to resemble that of Duarte or of the other seven clubs?

MR. KENNEDY: Resemble in what particulars?

MR. SMITH: In terms of the scope of activities and also in terms of the general recommendation by the District Governor.

THE WITNESS: Well, in membership, Rosemead would share the same membership categories as Duarte, being less than 20 at the time of this report. Both clubs expressed ambitious hopes of membership gain during the year. In the case of Rosemead, they expected to have a net membership gain to the 21 level, net growth, and in the case of Duarte, they had hoped to grow to 30. These are expectations, not accomplishments.

In terms of activities, both clubs list projects or areas, which they are going to examine, which seem to

be generally in concert with the amount of activity of clubs of this size.

MR. SMITH: Thank You. I have no further questions.

MR. KENNEDY: All right. Counsel, may we stipulate that the reporter will type this up and submit it directly to Mr. Pigman, who will make such corrections as he believes are appropriate, subject to the advice of Mr. Davis or his office. He will execute it before a notary and return the original to me and I will make appropriate arrangements to file it with the Court, if agreeable, perhaps not before trial, but at the time of trial. Is that all right?

MR. SMITH: So stipulated.

AND FURTHER DEPONENT SAITH NOT.

## **APPENDIX H**



The applicable Constitutional provisions are:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . [I Amend.]

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.  
[XIV Amend., § 1]



No. 86-421 (4)

Supreme Court, U.S.  
**FILED**

**OCT 15 1986**

JOSEPH F. SPANOL, JR.  
CLERK

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

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**BOARD OF DIRECTORS OF  
ROTARY INTERNATIONAL, et al.,**  
*Appellants,*

**vs.**

**ROTARY CLUB OF DUARTE, et al.,**  
*Appellees.*

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Appeal from the Court of Appeal  
of the State of California  
Second Appellate District

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**MOTION TO DISMISS OR AFFIRM**

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October 1986

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## QUESTIONS PRESENTED

1. Does a state court judgment which enjoins a large public service organization from enforcing its male-only restriction against a local club violate the organization's First Amendment Associational rights where, inter alia, the organization:

has almost 20,000 clubs whose memberships consist of nearly 1,000,000 persons; has a multi-million dollar budget; seeks memberships from the broadest cross-section of the communities in which it has clubs; seeks to have clubs in as many communities as possible; conducts a wide-ranging public relations program; operates a publishing house which publishes hundreds of publications including a magazine which

solicits advertising from the public and which is sold to public libraries and other reading rooms; licenses its emblem to commercial firms for royalties; conducts business conferences for the club members; encourages the clubs to invite non-organization persons to be guests at club meetings; encourages the clubs to have female committees participate in the work of the clubs; whose club members or their employers, with the approval of the Internal Revenue Service, treat their dues as business expenses; whose members do not vote as to the admission of new members.

2. May an appellant be heard in this Court as to an alleged vague and overbroad application of a state's public accommodations statute when that issue was not timely presented in the state courts or when the statute both on its face and as applied to appellant is not vague? In any event, is California's public accommodations law, the Unruh Civil Rights Act, California Civil Code section 51, unconstitutionally vague or overbroad?



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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1986

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BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

APPELLANTS

v.

ROTARY CLUB OF DUARTE, et al.

---

Appeal from the Court of Appeal  
of the State of California  
Second Appellate District

MOTION TO DISMISS OR AFFIRM

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Appellees move the Court to dismiss this appeal or, in the alternative, affirm the judgment of the court below on the grounds that the appeal is not within this Court's jurisdiction, that it does not present a substantial federal question, that the questions on which the decision of the case depends are so un-

substantial as not to need further argument.

Noting the practice of this Court in sometimes treating a jurisdictional statement as a petition for writ of certiorari, appellees urge the Court not to do so in this instance.

If, however, the Court should do so, appellees oppose the granting of certiorari on the grounds that the state court has not decided a federal question in any way in conflict with a decision of a state court of last resort nor with a decision of a federal court of appeals; nor has the court below decided an important question of federal law which has not been but should be settled by this Court; nor has the court below decided a federal question in a way that conflicts with applicable decisions of

this Court. Nor is there any other reason why this Court should grant review.

#### STATEMENT OF THE CASE

In 1977 the Rotary Club of Duarte admitted women. Subsequently, Rotary International (International) ordered Duarte to expel the women. When Duarte refused, International expelled it.

After following International's internal appeal procedures to no avail, Duarte and its women members (Duarte) filed this suit seeking reinstatement, charging International with violating, inter alia, California's public accommodations statute, the Unruh Civil Rights Act. (Cal. Civ. Code section 51; Cal. Stats. 1959, ch. 1866, sec. 1, p. 4424) The Los Angeles Superior Court refused



to reinstate the Duarte club or to issue the injunction requested, finding no violation of the Unruh Act. Duarte's own associational rights were ignored. The Court of Appeal reversed.

International's petition for rehearing in the Court of Appeal and its petition for review in the California Supreme Court were denied.

I. THIS COURT HAS NO JURISDICTION OF THE APPEAL.

In the proceedings below there was no occasion for the California courts to pass upon the validity of the Unruh Civil Rights Act, for appellants did not draw in question the validity of that act on the ground of its being repugnant to the Constitution, treaties or laws of the United States. Title 28 U.S.C. section 1257(2) requires them to do so in order to give this Court jurisdiction on appeal.

What International did, as stated by it in its Jurisdictional Statement (pp. 4-5), is defend on the ground "that to require local Rotary clubs to admit females would violate their associational rights under the First and Fourteenth Amendments to the United States Constitution." That is how the Court of Appeal understood the defense: "International argues that forcing it to excuse compliance with the male-only membership policy would violate the associational freedoms afforded it by the federal Constitution." [JS, App. C-33] This is not sufficient. As stated by Stern & Gressman, "Supreme Court Practice," 6th Ed., p. 113:

It is necessary for appeal purposes that the litigant make specific and plain in the state court his contention that the application of the statute to his particular circumstances would

make the statute void under federal law. If he chooses not to frame his claim in that manner but argues instead that his federal rights prevent application of the statute to him, an adverse decision amounts to a denial of his assertion of federal rights rather than a validation of the state statute, and review can be had in the Supreme Court only via certiorari under section 1257(3).

**Mergenthaler Linotype Co. v. Davis,**  
251 U.S. 256 (1920), cited by the  
authors, fully supports their conclusion. This Court there said:

The claim that the lease contract was made in the course of interstate commerce and therefor not subject to state statutes was insufficient to challenge the validity of the latter; at most it but asserted a "title, privilege, or immunity" under the Federal Constitution which might afford basis for certiorari, but constitutes no ground for writ of error from this court.

What International argued in

the courts below is that its federal associational rights prevented the California courts from requiring it to refrain from applying its male-only restriction to the Duarte Rotary Club. It did not argue that the application of the Unruh Act to its particular circumstances would make the Unruh Act invalid under federal law.

For example, in its brief before the Court of Appeal, International's Point II stated: "THE TRIAL COURT PROPERLY CONCLUDED THAT THE INJUNCTION SOUGHT WOULD VIOLATE ROTARY'S FREEDOM OF ASSOCIATION." Sub-point A argued: "The Jaycees Decision (referring to **Roberts v. United States Jaycees**, 468 U.S. 609 [1984]) Confirms that the Injunctive Relief Sought Would Infringe Rotary's First Amendment Freedom of Association."

This did not draw in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States nor was the decision of the court below in favor of its validity. **Jett Brothers Distilling Co. v. Carrolton**, 252 U.S. 1, 6 (1920).

II. NO NEW OR SUBSTANTIAL QUESTIONS ARE PRESENTED.

Rotary International has misstated what this case is about. International says that the California Court of Appeal has applied the Unruh Civil Rights Act "to preempt and govern the membership policies of a local Rotary club." [JS, p. 6]

That was not even an issue in the case. Rather, the Court of Appeal held that International was prohibited by the Unruh Act from preempting the membership

policies of the local club. Duarte admitted women. International tried to prevent it from so doing.

**Roberts v. United States Jaycees**, supra, 468 U.S. 609 (1984), settled the question affirmatively as to whether a large non-profit public service organization is subject to a state's public accommodations statute.

A. Rotary International is not the selective, intimate association which would be exempt from California's public accommodations law.

In its Point I, B (JS, pp.17-24) International argues that its expressive associational constitutional rights are violated if it is unable to enforce its male-only requirement against the California local clubs. Since International did not raise this issue below, it may not be heard on it now. **Cardinale v.**

**Louisiana**, 394 U.S. 437 (1969).

In any event, the point is not well taken. There is nothing about the admission of women into Rotary clubs that will in any way interfere with International's or the clubs' ability to express themselves. **Roberts**, 468 U.S. at 626-27.

In the courts below International did raise its "intimate" associational rights defense. We turn to that question.

In the first place, International is plainly wrong in its assertion [JS, 4, 12] that "the primary purpose of Rotary is to encourage a fellowship among business and professional men." Whatever place conviviality may have in the relationship among club members, it is not Rotary's primary purpose.

The primary purpose of Rotary,



as authoritatively set forth in its official publication, 1981 Manual of Procedure, p. 7, is that it is "an organization of business and professional men united world wide who provide humanitarian service, encourage high ethical standards in all vocations and help build goodwill and peace in the the world." Or, as stated by the managing officer of International, its General Secretary, community needs "are the objectives of Rotary and the only reason for [the clubs'] existence." [JS, App. G-34; emphasis added]

International, like the Jaycees, is not the kind of "private" organization the intimacy of which is sufficient to override California's compelling interest against sex discrimination.

In the second place,  
International's freedom of association

argument has already been answered by this court in **Roberts v. United States Jaycees**, supra, p. 7, and in **Hishon v. King & Spalding**, 467 U.S. 69 (1984).

International's appeal is based on the premise that **Roberts** is not applicable because the Jaycees and Rotary are different types of organizations. Actually, the Jaycees and Rotary are remarkably similar. Indeed, in its amicus curiae brief before this Court in **Roberts** International argued that this case and the Jaycees "present the same constitutional issues" [p. 3] that "organizations such as Rotary and the Jaycees are . . . entitled to protection of their associational rights . . . ." [pp. 6, 14] Similarly, the Conference of Private Organizations argued in its brief before this Court in **Roberts** in support of the Jaycees: "The

membership recruiting of the Jaycees is not unlike the practice or [sic] other restricted-class membership associations, such as national fraternal and service organizations." [p.12]

In **Roberts**, a local chapter of the Jaycees admitted women and had sanctions imposed upon it by the national organization. The United States Jaycees argued that the attempt by Minnesota to apply to it its public accommodations act violated its right to freedom of association. That argument, rejected by this Court, is the same argument International is now making .

International's rationale for this appeal is that since "it is not easy to draw a 'bright line' between private, personal associations and those in which '[t]here was no plan or purpose of exclusiveness,'" there is a "'gray area

. . . in between' protected selective associations and commercial enterprises." [JS at 7-8] This case, says International, "affords the Court an excellent opportunity to narrow and lighten such 'gray area.'" [Id. at 8]

No enlightenment is needed. If there is a "gray area," this case is not within it. International itself states, quoting from **Roberts**, a "gray area" would be a club that is relatively small, has a high degree of selectivity in membership decisions and is secluded from others. [JS, p.7] International is none of these.

International is not even composed of human beings as it takes pains to make clear [JS, pp. 3, 9, App. G-12,16]; its membership consists of 19,788 clubs. [JS, p.9] The clubs in 1982 had almost a million members. [Id.10] The

Jaycees' 7,400 chapters have fewer than 300,000. **Roberts** at 613.

International's members, the clubs, do not even vote as to who may be fellow members. That decision is made by the Board of Directors. [1981 Manual of Procedure, p.247] In their amicus curiae brief before this Court in **Roberts** in support of the Jaycees, the Conference of Private Organizations pointed out that one of the core membership functions involving the constitutional right of associations, is the right to vote. [pp. 3,6]

The "selectivity" about which International speaks [JS pp. 8, 10, 14] is not selective at all. The determination as to who may join a club is made, according to International's objective criteria (e.g. male, in a business or profession, local), by the

clubs themselves, not by International. [JS, App. G-18] Every local club must welcome any member of any other local club, even though the club had no say in selecting that person or his club. [JS, App. G-23-24]

In arguing that the Jaycees is not selective but Rotary is, International points to its purported restriction of membership to one person from each occupational category as "selectivity."

[JS, p. 17] 1/ This is "selectivity" in name only. An objective of International is that every business, profession and institution in the

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1/ International also refers [id.] to "other selective criteria," such as "potential members being screened" for their reputation for business integrity, their dedication to Rotary's service objectives and their willingness to participate. These criteria are applied by Duarte and other local clubs, not by International.

community be represented. [1981 Manual of Procedure 2/ pp. 30,31]

Even the "one person" restriction is not that at all. Under certain circumstances a club has the right to admit more. [1981 Manual of Procedure, pp. 240, 249, 304] And there is not even an ostensible "one person" limitation as to the clergy, news media and diplomats. [Id. at 240] Indeed, the clubs are encouraged to obtain full representation from all the local press in the community. [Id. at 37]

As the Court of Appeal explains:

While the classification principle--i.e., membership criteria--established by International, and by which local clubs must abide,

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2/ The Manual of Procedure was introduced into the record as Exhibit A-3 to the deposition of Mr. Herbert A. Pigman, General Secretary of International and its active managing officer. [JS, App. G-4] It is "an authoritative statement of Rotary practices and principles." [Id. at G-7]



might at first blush appear to be selective, Rotary's own literature dispels this notion. Noting that the classification principle "would seem to be a restrictive provision" International, through its literature, explains that "its purpose is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross section of the business and professional life of the community." [JS, App. C-1-2; emphasis in original]

Furthermore, even if International did adhere to its one person per occupation rule, that would not make it selective. Under an accommodations statute an organization that is so selective that it is limited to doctors may not exclude women doctors or black doctors simply because of their sex or race.

The Jaycees is non-selective; so is Rotary. Nor is either of them small or secluded.

The presence of its signs at the entrances to cities and towns all over the country calling attention to itself is a graphic demonstration that there is nothing "secluded" about Rotary International.

Just as International's claim that it is selective does not stand scrutiny, neither does its claim that it is not business related, 3/ although there is no requirement that a public accommodations statute be confined to "commerce." Cf. **Sullivan v. Little Hunting Lodge**, 396 U.S. 229 (1969) [community park]; **Tillman v. Wheaton-Haven Recreation Association**, 410 U.S. 431 (1973) [community swimming pool].

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3/ The trial court "found" that International is not a business establishment (con. next pages)

The Court of Appeal found considerable evidence of Rotary's Business purposes. Among the most

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3/ment within the meaning of the Unruh Act. [JS, App. B-8] International argues that the Court of Appeal substituted its own findings for those of the trial court in holding otherwise. [JS, p.9] International confuses findings of fact with legal conclusions which the court drew from the uncontroverted facts. As the Court of Appeal pointed out, whether International is a business establishment under the Unruh Act is a question of California law, not a question of fact. [JS, App. C-16] This Court, of course, is bound by the state court's interpretation of the state statute. **Aero Mayflower Transit Co. v. Board of Railroad Commissioners**, 332 U.S. 495, 499-500 (1947).

Even so, International is in error in its attempt to suggest that somehow there is conflicting evidence in this record. There is none. The only factual dispute in the case had to do with an estoppel issue. The trial court credited International's witness and not those of Duarte. Because of this, plaintiffs did not pursue that issue on appeal. There were no other disputed facts. The facts upon which the Court of Appeal based its decision are all in uncontroverted testimony or stipulations accepted by both parties. Neither the trial court nor the Court of Appeal was presented with a deci-

significant is the Rotary Clubs members' practice of deducting their dues from their income taxes or having them paid by their businesses. The City of Hope Medical Center and the City of Duarte pay their employees' dues. [JS, App. C-25-26] A former treasurer of the Bakersfield Rotary Club testified that 95-96% of the local members' dues were paid by their companies. [Id. at C-26] The Internal Revenue Service allows such deductions. [Id. at C-25] It allows social club dues to be deducted if the club is primarily for business and the use is directly related to the conduct of the business. 28

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3/ sion as to which set of conflicting facts to believe. The Court of Appeal was not bound to accept the legal conclusions of the trial court simply because that court erroneously labeled them findings of fact. **Harry Gill Co. v. Superior Court**, 238 Cal. App. 2d 666, 670, 48 Cal. Rptr. 93 (1965)

U.S.C. 274(a)(2)(A)

International cannot have it both ways. Its own members' actions show the hypocrisy of the claim that membership is completely devoid of business purposes.

International insists that because Rotarians are not supposed to join for business gains, that makes Rotary "non-business." [See JS, pp. 12-13] As the Court of Appeal points out:

The mere fact, however, that the use of Rotary membership for commercial gain is proscribed in a written policy statement promulgated by the Board does not mean that commercial advantages and business benefits have in actuality ceased to flow from Rotary membership or that they are not significant motivating forces in joining local clubs. [JS, App. C-24-25]

The court points to the evidence that "leaves no doubt that business con-

cerns are a motivating factor in joining local clubs" [Id. at C-26], and concludes:

[T]he evidence establishes that there are business benefits enjoyed and capitalized by Rotarians and their businesses or employers.

The evidence simply does not support the trial court's finding that these business advantages are merely incidental. By limiting membership in local clubs to business and professional leaders in a community, International has in effect provided a forum which encourages business relations to grow and which enhances the commercial advantages of its members. [Id. at C-26]

See, also, Burns, "The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality:" "few assets are as valuable as membership in the right men's club for climbing the professional ladder."  
18 Harv. C. R.-C. L. L. Rev. 321, 334

(1983)

One of the services International provides for its clubs' members is business relations conferences where:

The Rotarian learns management techniques that help improve his own business or professional skills. He receives the inspiration of discussing business problem with experts in his own or related fields. And he enjoys the fellowship of sharing ideas with fellow Rotarians. [Trial Record, Exh. 9, Clerks' Transcript (CT) 346]

The Jaycees is a business; so is Rotary.

International criticizes the Court of Appeal for not having referred to the women plaintiffs' acknowledgment "that they did not join the Rotary Club of Duarte for the purpose of promoting their business and professional careers,



nor did they feel that they had been impeded in their pursuit of any such careers by any action of Rotary International." [JS, p. 15] International is inaccurate. The women's statement was that they did not join for that express purpose. [CT, 217C-D]

The Court of Appeal properly ignored the point because it was relevant only to the cause of action based on the California Constitution, a cause of action not reached by the Court of Appeal. It was not relevant to the Unruh Act cause of action because the Unruh Act does not require monetary harm as a basis for judgment. It is the discrimination that is the heart of the Unruh Act. That Act expresses "[California's] compelling interest in eradicating discrimination against its female citizens." **Roberts** at p. 623.

When Rotary refuses to allow women to become club members and benefit from that membership, it violates the Unruh Act regardless of whether the women suffered actual monetary injury.

Furthermore, the women were not impeded in the pursuit of their careers because they were admitted to the Duarte club. But they, like all the other members of Duarte, were harmed by the club's expulsion from International.

In its struggle to distinguish itself from the Jaycees, International notes that women participated in activities of the Jaycees and claims that Rotary club meetings are not open to the public. [JS, 20-21] But non-Rotarian guests are welcome at Rotary club meetings and special efforts are made to have them there "in order that non-

Rotarians may be better informed about the function of the Rotary club and its objectives." [1981 Manual of Procedure, p. 35] Moreover, many Rotary clubs with the encouragement of International, "have ladies committees or other associations composed of women relatives of Rotarians cooperating with and supporting them in service and other Rotary club activities." [1981 Manual of Procedure, p. 47]

The record does not reflect the extent of women's participation in Rotary activities, but in the Jaycees, as associate members, they accounted for only 2% of the membership. **Roberts** at 613.

There are few differences between the Jaycees and Rotary, but many similarities. Both are non-profit membership corporations with educational and

charitable purposes; members are recruited through local chapters; national headquarters employs a staff to help develop programs for the local chapters to enhance individual development, community development and club members' management skills. [468 U.S. at 614; JS, App. C-21-22; Extension Manual, Section III, P. 1]

While International tries to show how dissimilar it is from the Jaycees, it also argues how much like Kiwanis it is. [JS 13-14, 17] That is because of this Court's reference to Kiwanis in *Roberts*, 468 U.S. at 630, and because of a 1977 decision of the New York Court of Appeals holding that that state's public accommodations law was not applicable to Kiwanis.

This Court's reference to Kiwanis

was based on an illustrative remark by the Minnesota Supreme Court when the Jaycees case was before it. **United States Jaycees v McClure**, 305 N.W.2d 764, 771 (1981) That remark was based upon no record as to the nature of Kiwanis. **Roberts**, Appell't's Brief, p.27.4/ Concerning that, the trial court in the case said: "There is insufficient evidence in the record pertaining to the activities of [Kiwanis and other groups] to allow any determination whether the statute would apply to them and whether the groups engage in protected First Amendment activity." **United States Jaycees v. McClure**, 534 F. Supp. 766, 773 (D. Minn. 1982)

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4/ The evidence about Kiwanis in the Minnesota court consisted of Kiwanis' Constitution and By-Laws, a roster of the Minneapolis members and a thumb-nail sketch of it in 1 Encyclopedia of Private Organizations. [Id,]

Nor does the record here contain any facts about Kiwanis.

Similarly, in the New York case, **Kiwanis Club of Great Neck v. Kiwanis International**, 74 N.Y.S.2d 265, 83 Misc.2d 1075 (1975), aff'd, 41 N.Y.2d 1034, 395 N.Y.S.2d 633, 363 N.E.2d 1378 (1977), there was no trial. The trial court's declaratory judgment for Kiwanis was based on the club's motion for a temporary injunction and judgment on the pleadings and on defendant's cross-motion to dismiss. The dissenting judge in the intermediate appellate court noted the absence of a trial and argued that the preliminary injunction should be granted to preserve the status quo pending trial. **Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis International**, 383 N.Y.S.2d 333,

394, 52 A. D.2d 906 (1976). It is noteworthy that the New York Court of Appeals pointed out that it was affirming the Appellate Division order (affirming the trial court) based "on this record." [41 N.Y.S.2d 633; emphasis added]

Moreover, in light of the New York Court of Appeals' 1983 decision in **United States Power Squadrons v. State Human Rights Appeal Board**, 59 N.Y.2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199 (1983) which held that a national boating and safety organization must comply with New York's public accommodations statute, the viability of the Kiwanis Club of Great Neck decision may well be questioned.

Significantly, when there was a trial as to the nature of Kiwanis, that court found that the organization is



properly subject to a state's public accommodations law. **Kiwanis International v. Ridgewood Kiwanis Club**, 627 F. Supp. 1381 (D.N.J. 1986), appeal pending, which International fails to mention,. Because the local Kiwanis club had admitted women, Kiwanis International attempted to prevent it from using the name Kiwanis. Ridgewood's defense was based on the illegality of Kiwanis' exclusion of women under New Jersey's public accommodations statute.

The court held that Kiwanis, with 8200 local clubs and a worldwide membership of 313,000, id at 1388, was not sufficiently intimate nor selective to be exempt from the law. Rotary International has more than twice the number of clubs and the local clubs have about three times as many members.

International claims that it, like the Lions, another public service organization, is entitled to exemption from public accommodations statutes. [JS, p. 23] No evidence as to the nature of Lions is presented. However, there has recently been a trial as to the application of Oregon's public accommodations statute to Lions. In that case, **Lloyd Lions Club of Portland v. International Association of Lions**, \_\_\_ Or. App. \_\_\_, (Sept. 10, 1986), pet. for hrg. pndg the Court of Appeals affirmed the trial court which had held that that organization was subject to the statute.

- B. The Court of Appeal properly weighed International's freedom of association against Duarte's freedom of association and the state's interest in its woman citizens' freedom from discrimination.

The crux of International's

case is its contention that its freedom of association outweighs the state's interest in assuring its citizens' freedom from sex discrimination. Despite the undisputed facts, it tries to present a picture of smallness and intimacy.

International's concern for "little 21-member Duarte" being covered by the Unruh Act [JS, 28] is touching. But it is not Duarte that is protesting. It sees no conflict between complying with the Unruh Act and carrying out its function as a Rotary Club. 907,750 strong International is claiming a right to free association, a right it wants to deny to little Duarte.

International tries to use **Roberts** to support its claimed right to discriminate against women even though the decision is diametrically opposed to that

claim. As this Court stated in **Roberts**:

Minnesota's compelling interest in eradicating sex discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms. [468 U.S. at 623]

But, of course, the rights and needs of women are only part of the issue. As this Court further explains:

By prohibiting gender discrimination in places of public accommodation, the Minnesota Act protects the State's citizenry from a number of serious social and political harms. [Discrimination] both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.  
. . .

That stigmatizing injury, and the denial of equal opportunity that accompanies it, is surely felt as strongly by persons suffering discrimination

on the basis of their sex  
as by those treated differ-  
ently because of their race.  
[Id. at 625]

Shortly before deciding **Roberts** this Court went even further in rejecting the argument that freedom of association allowed sex discrimination in violation of law. In **Hishon v. King & Spalding**, 467 U.S. 69 (1984), the question was whether federal law against employment discrimination by reason of sex [Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e et seq.] prohibited a law firm from discriminating in its partnership decisions. The judgment in **Hishon** was unanimous. If a group as intimate as a law firm partnership may not use freedom of association as an excuse for sex discrimination, an organization as large and impersonal as Rotary International

certainly may not.

III. INTERNATIONAL MAY NOT BE HEARD AS TO WHETHER THE UNRUH ACT IS VAGUE OR OVERBROAD; IN ANY EVENT, IT IS NEITHER

A. The point was not timely presented to the California courts.

In neither of its briefs in the trial court [CT, 218, 294] nor in its brief in the court below did International make a vague/overbroad argument.

In its petition for rehearing before the court below and in its petition for review before the California Supreme Court, both of which were denied without opinion, International made an argument based on "uncertainty." But this was too late, both under California law, **Cain v. French**, 25 Cal. App. 499, 502, 144 P. 302 (1914); Rule 29(b)(1), California Rules of Court, and in this Court. **Radio WOW v. Johnson**, 326 U.S.

120, 128 (1945); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919).

This Court will not hear a matter that was not properly presented to the courts below. [Id.]

B. International may not contest the validity of the Unruh Act as applied to other situations.

International overstates the rule when it says [JS, p. 25] that a constitutional challenge to a statute claimed to be vague and overbroad may be raised even by one to whom the statute, as applied, is neither. In the first place, International confuses the separate doctrines of vagueness and overbreadth. As explained in 1 Emerson & Haber, "Political and Civil Rights in the United States", 4th Ed. p. 1487:

Despite the apparent similarity between the purpose and effect of the two doctrines, how-



ever, the Supreme Court continues to insist that a litigant asserting a vagueness defense demonstrate that the statute in question is vague as applied to his conduct, without regard to its potentially vague application to others.

The cases support the authors.

Thus, in **Parker v. Levy**, 417 U.S. 733 (1974), a free speech case in which the Court of Appeals had voided "conduct unbecoming an officer and a gentleman" type statutes on the ground of vagueness because of their possible application to persons other than the defendant, although the defendant's conduct was clearly within the statute's prohibition, this Court reversed. It said:

The result of the Court of Appeals' conclusion that Levy had standing to challenge the vagueness of these articles as they might be hypothetically applied to the conduct of others,

even though he was squarely within their prohibitions, may stem from a blending of the doctrine of vagueness with the doctrine of overbreadth, but we do not believe is supported by prior decisions of this Court.

. . .

[O]ne who has received fair warning of the criminality of his own conduct is [not] entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. [*Id.* at 756; emphasis added]

In *Hoffman Estates v. Flipside*, *Hoffman Estates*, 455 U.S. 489, 495 (1982), this Court again recognized the distinction: "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

International's conduct clearly falls within the precise language of the Unruh Act. Just as its male-only rule is not vague, neither is the Unruh Act's prohibition against it. There is nothing about which International has to guess when it reads the statute and is told that it may not discriminate on the basis of sex. International may not, therefore, challenge it for vagueness.

Nor may International challenge Unruh on the ground of overbreadth.

In **Broadrick v. Oklahoma**, 413 U.S. 601 (1973), this Court, though recognizing, as to specific First Amendment cases, the overbreadth exception to the general rule, pointed out that "[a]pplication of the overbreadth doctrine . . . is, manifestly, strong medicine. It has

been employed by the Court sparingly and only as a last resort." [Id. at 613]

Refusing to strike down a statute assertedly overbroad on its face, the Court said:

It may be that such restrictions [the wearing of political buttons or the use of bumper stickers] are impermissible and that section 818 may be susceptible of some other improper applications. But, as presently construed, we do not believe that section 818 must be discarded in toto because some persons' arguably protected conduct may or may not be caught or chilled by the statute. Section 818 is not substantially overbroad and is not, therefore, unconstitutional on its face. [second emphasis added; Id. at 618]

Similarly, in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), this Court in answer to a challenge to the Hatch Act on the ground of overbreadth, said:

Even if provisions forbidding partisan campaign endorsements and speechmaking were to be considered in some respects unconstitutionally overbroad, we would not invalidate the entire statute as the District Court did. The remainder of the statute, as we have said, covers a whole range of easily identifiable and constitutionally proscribable partisan conduct on the part of federal employees and the extent to which pure expression is impermissibly threatened, if at all, by section 733.122(a)(10) and (12), does not in our view make the statute substantially overbroad and so invalid on its face. [*Id.* at 580-581, citing Broadrick; *emph. add.*]

The California courts' interpretations of the Unruh Act of which International complains do not make the act overbroad. Even if they arguably may, the remainder of the statute, the statute itself and its specific prohibitions, cover easily identifiable and constitutionally proscribable conduct. The interpretations do not threaten

pure expression.

Accordingly, there is no warrant for having further argument as to overbreadth in this case.

In *Roberts* this Court accepted the illustrative Kiwanis remark of the Minnesota Supreme Court as a demonstration of "the state court's articulated willingness to adopt limiting constructions that would exclude private groups from the statute's reach." That, "together with the commonly used and sufficiently precise standards it employed to determine that the Jaycees is not such a group, establish that the Act, as currently construed, does not create an unacceptable risk of application to a substantial amount of protected conduct."

468 U.S. at 630-31 [Emphasis added]

California has expressed its willingness and its desire to respect asso-

ciational rights despite its anti-discrimination statute when indicated.

In **Curran v. Mt. Diablo Council of Boy Scouts of America**, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), app. diss. 468 U.S. 1205 (1984), the court recognized the principles set forth in Mr. Justice Douglas' dissent in **Moose Lodge No. 107 v. Irvis**, 407 U.S. 163, 179-80 (1972), saying that the constitutional provisions "restrain the Legislature from enacting anti-discrimination laws [for] strictly private clubs or institutions." [Emphasis in original] And the court carefully considered the indicia of a private club, understanding that "[i]n determining whether an establishment is in fact a private club, there is no single test" [Id. at 730 and 731]



And in *Isbister v. Boys' Club of Santa Cruz*, 40 Cal. 3d 72, 707 P.2d 212 (1985), the California Supreme Court similarly recognized the private club exemption, saying: "We emphasize the limited scope of our holding. Nothing in our analysis necessarily extends to organizations which operate facilities not generally open to the public, or which maintain objectives and programs in which the operation of facilities is merely incidental." [*Id.* at 76-77]

It is thus clear that California, just as much as Minnesota, recognizes the necessity to protect associational constitutional rights. Its public accommodations law presents no unacceptable risk of application to protected conduct.

- C. There is nothing about the California courts' application of the Unruh Act that is vague or overbroad.

The second question presented to this Court by International in its Jurisdictional Statement reads:

Is the Unruh Act, construed by the California Court of Appeal as applicable to such clubs, unconstitutionally vague and overbroad as an instrument for regulating memberships protected by First Amendment freedom of association? [JS, p.1]

This question, as stated, merits little discussion. Just as there is nothing vague or overbroad (from the standpoint of understandability and applicability) about International's male-only rule, there is nothing vague or overbroad about the Unruh Act's proscription against discrimination on the basis of sex. The Court of Appeal simply ordered that International may not apply its male-only rule--may not

discriminate on the basis of sex. That is not vague or overbroad. No one can be in doubt about what that means nor to whom it applies.

In its discussion (JS, Point II, pp. 24-29), International changes the question around and complains of what "California Courts," have done in other cases in other situations. As explained above, International is in no position to complain about those other cases or situations. Even if it were, its point is not well taken.

International's argument stems from a statement in another sex discrimination case, *Isbisyer v. Boys' Club of Santa Cruz*, supra, 40 Cal. 3d at 86, in which the California Supreme Court reiterated what had long been the interpretation of the Unruh Act, based upon its legislative and judicial history,

that the specific proscriptions named in the Act were "illustrative rather than restrictive" and therefore the Act "accords every person an individual right against 'arbitrary' discrimination of any kind" by a business establishment.

International then asks "what is arbitrary?" [JS, p. 25] It refuses to accept the court's construction of the word that conduct which is "rationally related to the services performed and facilities provided" [In re Cox, 3 Cal. 3d 205, 212, 474 P.2d 992 (1970)] is not arbitrary and therefore not interdicted by the act. International then pretends it cannot understand that construction.

The construction is plain. For example, it is not arbitrary for a bird watchers' group to limit its membership

to people who have spotted at least fifteen types of birds. It is arbitrary to exclude female bird watchers. There is no reason why exclusion of women rationally relates to the club's goal of providing an association of experienced bird watchers.

International also wants to know "what is a business establishment?" [JS, 27] That is just another way of asking what is a place of public accommodation within a state statute which uses those words instead of California's. The careful discussion in the California cases point out that the encompassing language of the Unruh Act, not merely "business establishments," but business establishments of "every kind whatsoever," means just that. California has been no different than a number of other states which have applied their public

accommodations laws to large, public service organizations, a body of law International disregards. Examples are: the Young Men's Christian Association (*Nesmith v. Young Men's Christian Association*, 397 F.2d 96 [4th Cir 1968], *Stout v. Young Men's Christian Association*, 404 F.2d 607 [5th Cir. 1968]), Little League (*National Organization for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33 [1974], aff'd 67 N.J. 320, 338 A.2d 198 [1974]), Kiwanis (*Kiwanis International v. Ridgewood Kiwanis Club*, 627 F. Supp. 1381 (D.N.J. 1986), appeal pending), Lions (*Lloyd Lions Club of Portland v. International Association of Lions Clubs*, \_\_\_ Or. App. \_\_\_, \_\_\_ P.2d \_\_\_ [Sept. 10, 1986] pet. for hrg. pndg), youth football (*United States v. Slidell Youth*

**Football Association**, 387 F. Supp. 474, 482-84 [E.D. La 1974]), a national boating and safety organization (**United States Power Squadrons v. State Human Rights Appeal Board**, 59 N.Y.2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199 (1983)).

None of the California cases complained of by International raises any vagueness or overbreadth problem.

In **Cox**, supra, 3 Cal. 3d 205, the court held that a shopper, the companion of a youth whose hair was long and who was dressed in an unconventional manner, could not be convicted of trespass when he refused to leave a shopping center after a guard told him to. Being accompanied by a "hippie" bears no relationship to making a purchase. Therefore the shopping center's conduct is arbitrary. It falls well within the



definition: conduct which is not  
"rationally related to the services  
performed and the facilities provided."  
3 Cal. 3d at 217.

**Isbister** itself, *supra*, 40 Cal. 3d  
72 was a straight sex discrimination  
case. There is nothing vague or  
overbroad about a statute's application  
to an establishment whose facilities are  
open only to boys.

The court in **Marina Point v.**  
**Wolfson**, 30 Cal. 3d 721, 640 P.2d 115  
(1982), held that a large apartment  
complex could not evict a family living  
there simply because it had a child.  
International errs in its description  
that the complex lacked facilities for  
children. [JS, p. 25] The landlord  
contended that it was entitled to evict  
the family because the premises had no  
special facilities for children. As the

court pointed out, the landlord conceded that the facilities had been unaltered subsequent to the institution of the no-children policy and that children lived in the complex both before and since. 30 Cal. 3d at 728. Moreover, there is no requirement that an apartment house have special facilities in order for children to be able to live there.

In *Curran v. Mt. Diablo Council of the Boy Scouts*, supra, 147 Cal. App. 3d 712 (1983), the court held that a homosexual Eagle Scout could not be expelled merely on the ground of his sexual orientation. That orientation bore no relationship to his ability to perform the tasks of a scout, as his advancing to the highest rank made clear.

International's description of

**Marsh v. Edwards Theatre Circuit, Inc.,**

64 Cal. App. 3d 881, 134 Cal. Rptr. 844

(1976), is disingenuous. [JS, p.26]

That case was decided under a totally different statute, California Civil Code, section 54.1, (Cal. Stats. 1968, ch. 461, sec. 1 p. 1092) specially applicable to the handicapped. And the case was not decided on the ground that the theater's conduct was not "arbitrary," but rather that the statute did not require the property owner to engage in reconstruction of the premises, since they were in compliance with existing law when the premises were built. 64 Cal. App. 2d at 888

There is nothing in the construction or application of the Unruh Act by the California courts, and certainly not by the Court of Appeal in this case, that is vague or overbroad.

CONCLUSION

The appeal should be dismissed or the decision below affirmed. If the Court should treat the jurisdictional statement as a petition for writ of certiorari, the petition should be denied.

Respectfully submitted,

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October, 1986

No. 86-421

8

Supreme Court, U.S.  
FILED

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

*Appellants,*

v.

ROTARY CLUB OF DUARTE, et al.,

*Appellees.*

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**Appeal from the Court of Appeal  
of the State of California,  
Second Appellate District**

**BRIEF IN OPPOSITION TO MOTION  
TO DISMISS OR AFFIRM**

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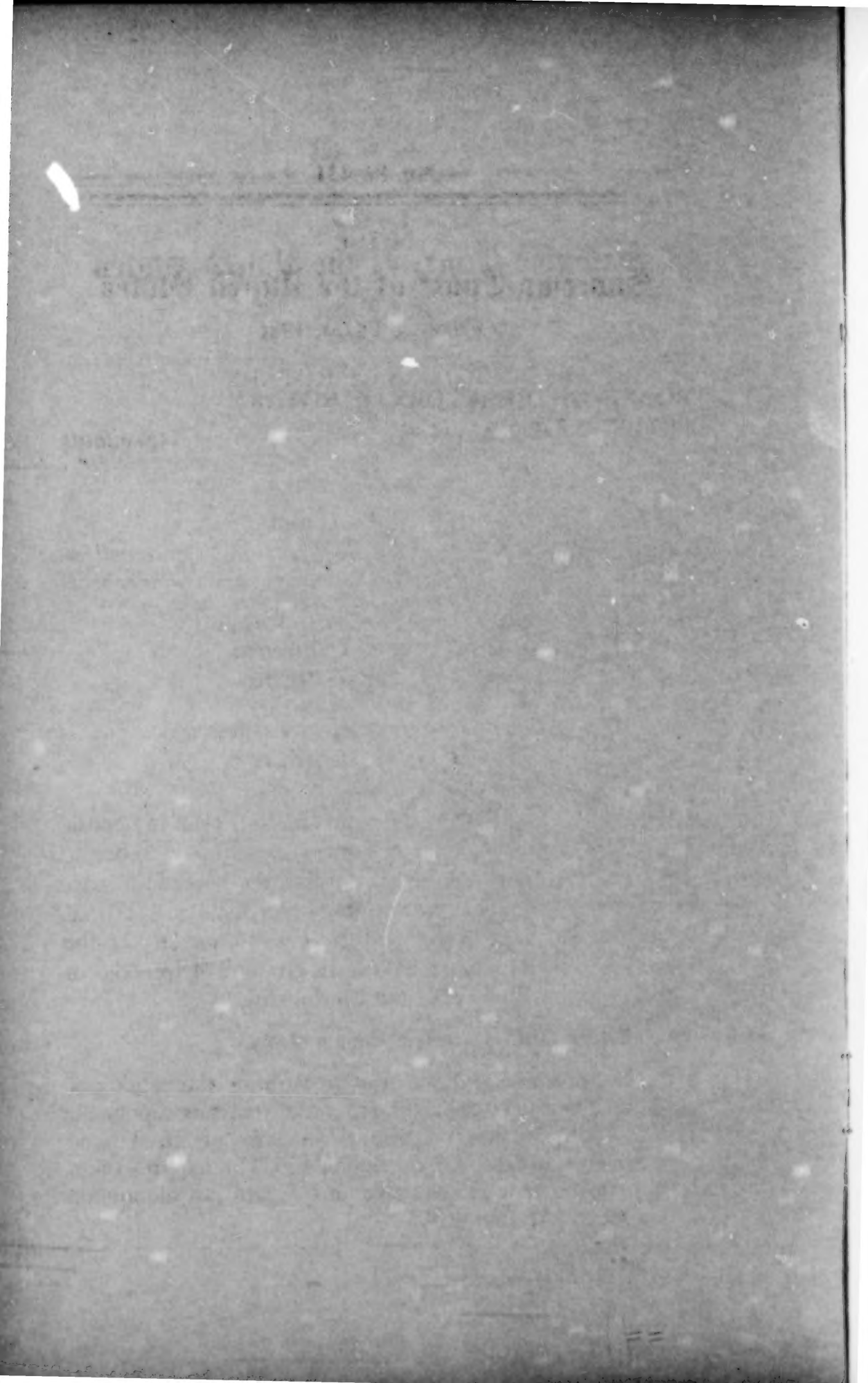
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TO DISMISS OR AFFIRM**

Pursuant to Rule 16.5, appellants file this brief in opposition to appellees' motion to dismiss or affirm in order to rebut appellees' statements concerning the procedural posture of this case. Specifically, this brief demonstrates that appellants squarely challenged the constitutionality of the Unruh Act in the courts below, on grounds of freedom of association and vagueness and overbreadth.

Appellees falsely assert in their motion:

. . . appellants did not draw in question the validity of that [Unruh] act on the ground of its being repugnant to the Constitution, treaties or laws of the United States. Title 28 U.S.C. section 1257(2) requires them to do so in order to give this Court jurisdiction on appeal. [Motion at 4.]



To the contrary, in their brief to the Court of Appeal, appellants explicitly stated:

The Unruh Act Cannot Be Constitutionally Applied to Memberships in Private Organizations Except Where Such Memberships Comprise a Vehicle for Public Sale of Goods, Services, or Commercial Advantages. [Brief at 23.]

Further, that brief contended:

To apply the Unruh Act to Rotary would be to apply it to the type of organization specifically excluded from the Minnesota Act. [Brief at 25.]

The Court of Appeal clearly understood the argument which appellants were making and rejected it, holding:

. . . application of the Unruh Act to International does not abridge its freedom of intimate or expressive association. [App. C-28]

The trial court equally understood appellants' contentions, and agreed with them:

. . . to require Rotary International *pursuant to the Unruh Act* to offer its membership to women (as well as to the entire public indiscriminately) would inflict severe, irreparable, and unconscionable harm upon Rotary and the associational rights of its members without commensurate or any substantial resulting economic benefit to women or the public.

\* \* \*

Where, as here, there is no persuasive proof that exclusion from membership in the purely private organizations comprising Rotary has imposed a material or substantial economic constraint upon any woman, it would be a violation of the defendants' rights to liberty of association under the United States Constitution for the California Courts or Legislature to require the defendant organizations to accept women in contradiction of the male only membership restrictions which

have frequently and recently been reaffirmed democratically by the members of Rotary. . . . [App. B-9, B-13]

The constitutionality of the Unruh Act was directly implicated in this case from its inception; the trial court construed the Unruh Act as inapplicable, thus avoiding the need to hold it unconstitutional. The Court of Appeal, however, met the challenge head-on and held that the Act applied to appellants and was constitutional nevertheless. Jurisdiction clearly lies under 28 U.S.C. § 1257(2) and 28 U.S.C. § 2101(c).

Even if this were not so, however, it is clear that this is a case where appellants claimed the constitutional right of freedom of association and such claim was denied by the Court of Appeal. As appellees recognize, in such cases a petition for certiorari under 28 U.S.C. § 1257(3) is appropriate, and this Court may treat the jurisdictional statement as a petition for writ of certiorari. *Local 926, International Union of Operating Engineers*, 460 U.S. 669 (1983); *Palmore v. U.S.*, 411 U.S. 389 (1973). For the reasons set forth at length in appellants' jurisdictional statement, this case should be heard by the Court on the merits so that vitally important issues of national significance can be resolved, whether on appeal or by the grant of a writ of certiorari.

Additionally, appellees, evidently concerned about the obvious vagueness and overbreadth of the Unruh Act as it has been construed by the California courts in numerous cases, including the present, desperately urge this Court not to consider this point. Again, they contend that no argument based on vagueness and overbreadth was advanced below and again they are in error. In respondents' brief to the Court of Appeal, the point was made clearly:

An even more serious potential for vagueness and overbreadth is that the Unruh Act (unlike the Minnesota statute) does not limit prohibited discrimination to race, color, creed, sex and other categories specifically

noted in the statute; rather it prohibits substantially *any* selectivity among customers. . . . This may be an appropriate regulation for the clientele of shopping centers, apartment houses, motels, gas stations, and coffee shops. But it is a blunt instrument when applied to organizations like Rotary where voluntary fellowship and congeniality are of the essence, or to any other organization entitled to First Amendment freedoms wherein "precision of regulation must be the touchstone in an area touching our most precious freedoms." *Elrod v. Burns*, 427 U.S. 347, 363 (1976). "It is enough [for unconstitutionality] that a vague and broad statute lends itself to selective enforcement against unpopular causes." *NAACP v. Button*, 371 U.S. 415, 435 (1963). [Brief at 26.]

Appellants submit that the constitutional issues of freedom of association, vagueness and overbreadth indeed were raised below. As stated in the jurisdictional statement and in the *amici curiae* briefs in support, the Court should accept jurisdiction of this case in order to deal substantively with vitally important issues.

Dated: October 31, 1986

Respectfully submitted,

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**Appeal from the Court of Appeal  
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Second Appellate District**

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**BRIEF OF THE CONFERENCE OF PRIVATE  
ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT  
OF APPELLANTS**

---

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The Conference of Private Organizations respectfully submits this brief as *amicus curiae* in support of the Jurisdictional Statement of the Board of Directors of Rotary International, et al.

### INTEREST OF AMICUS

The Conference of Private Organizations ("CONPOR") is a coalition of national, private membership organizations.<sup>1</sup> CONPOR was formed in Order to defend and protect the fundamental rights of its members, and citizens generally, to associate freely and privately upon such terms and conditions as they shall solely determine. CONPOR promotes this right by participating in judicial cases, providing information to legislative and administrative officials, and conducting educational activities.

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<sup>1</sup> The following organizations are members of CONPOR: the Benevolent and Protective Order of Elks, a benevolent, ritualistic, and fraternal society that charters approximately 2,250 lodges, which have approximately 1,650,000 members; the Loyal Order of Moose, a benevolent, ritualistic, and fraternal society that charters approximately 2,250 lodges, which have approximately 1,300,000 members; the Great Council of U.S. Improved Order of Red Men, a benevolent, ritualistic, and fraternal society that charters approximately 940 local lodges, which have approximately 53,616 members; Kiwanis International, a social and service organization that charters approximately 8,200 local Kiwanis clubs with approximately 313,000 individual members; the National Club Association, whose membership consists of over 1,000 private social clubs which have about one million individual members; the National Association of American Business Clubs whose membership consists of 136 private clubs, which have over 6,600 individual members; the United States Power Squadrons, whose membership consists of 450 local groups, which have over 50,000 members.

CONPOR's interest in this case arises from the diversity of membership requirements, limitations, and restrictions of the organizations which it represents. Some of these organizations limit their membership primarily on the basis of broad, objective classifications such as gender, age, religious belief, or literacy. Others rely primarily on subjective membership qualifications such as congeniality, avocation, social status, or economic status. Most employ both types of restrictions to one degree or another. CONPOR believes that the constitutional right of association protects the right of its membership associations to be selective in their core membership functions—voting, holding office, and making policy—on the basis of either broad, objective classifications such as gender, or on the basis of subjective factors such as congeniality, social status, or the like. Each of these membership policies represents a choice that is within the discretion of the group's members and may not be subject to government control.

All of the associations CONPOR represents contribute to the unique pluralism and diversity of our country. Because state and federal courts have interpreted state civil rights acts in ways that infringe upon the First and Fourteenth Amendment rights of CONPOR's members and similar groups, CONPOR believes this Court should further define the standards it has established to determine these rights. Accordingly, CONPOR submits this brief to show why the Court should note probable jurisdiction in this case.

### **SUMMARY OF ARGUMENT**

This case provides the Court the opportunity to protect the constitutional rights of private organiza-

tions such as Rotary clubs by defining some of the boundaries of the First Amendment protection that extends to these groups. Under the factors the Court announced in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (Brennan, J.), groups such as Rotary clubs have a constitutionally protected right of association because they are small, selective, and seek to foster fellowship among their members. Nevertheless, state and federal courts have used the *Roberts* factors to deny these groups their constitutional rights. It is appropriate, therefore, for this Court to note probable jurisdiction in this case.

The Jaycees are a large organization that is controlled at the national level. They are not selective in their choice of members. On the contrary, they actively and publicly recruit new members on the local, regional, and national levels. In addition, the Jaycees admit non-members to many of the functions central to the decision of their members to join the organization. Given these characteristics, it is obvious that the Jaycees fall well outside the boundaries of the First Amendment's protection of intimate association.

Obviously, there are many groups that do not share the Jaycees' characteristics. The locus of control of Rotary and Kiwanis clubs, for example, is the local club, a small group of people. These groups choose their members carefully because they seek to foster fellowship among their members. Thus, they should fall within the boundaries of First Amendment protection.

Unfortunately, the Court has not yet defined those boundaries with any precision. As a result, state and federal courts have improperly held that the mem-



bership decisions of certain groups, including Rotary clubs, are not constitutionally protected from the provisions of public accommodations statutes such as the Unruh Act, Cal. Civ. Code sec. 51 (West 1982). The decisions of these courts have also violated the constitutional rights of members of private organizations not to be associated with a viewpoint to which they object, and they have forced these groups to choose between their constitutional rights of free association and free speech. Because the lack of definition in the *Roberts* case has led to these unfortunate results, this Court should welcome the opportunity to clarify the First Amendment rights of private organizations. Accordingly, the Court should note probable jurisdiction in this case and order briefs on the merits and oral argument.

### ARGUMENT

#### I. STATE AND FEDERAL COURTS HAVE FAILED TO RECOGNIZE THAT PRIVATE ORGANIZATIONS, INCLUDING ROTARY CLUBS, HAVE A CONSTITUTIONALLY PROTECTED RIGHT OF FREE ASSOCIATION

The time has come for the Court to further define the standards it set out in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (Brennan, J.). In *Roberts*, the Court held that the Jaycees do not qualify for First Amendment protection either of intimate association or of expressive association. With respect to intimate association, the Court declined to mark the "potentially significant points on this terrain with any precision." 468 U.S. at 620. Instead, it only announced factors to determine how much protection the First Amendment affords the membership decisions of private groups. These factors include "size,



purpose, policies, selectivity, and congeniality." 468 U.S. at 620.

The Court in *Roberts* did not have to mark the boundaries of First Amendment protection, because, whatever these boundaries are, it is clear that the Jaycees fall outside them. The local chapters of the Jaycees are large and basically unselective groups. Age and gender are the only membership criteria used at either the local or national level, and the Jaycees admit women as associate members. Furthermore, people of both genders who are not members of the Jaycees often participate in many activities central to the decision of many members to associate with one another, including awards ceremonies, community programs, and recruitment meetings. 468 U.S. at 621.

Because local Jaycees chapters are neither small nor selective, the Court refused to extend the First Amendment protection of intimate association to them. Other private groups, however, do not fall so clearly outside the bounds of constitutional protection. Nevertheless, based on the Court's decision in *Roberts*, other courts have seen fit to refuse to extend First Amendment protection to these groups' memberships decisions in the face of state statutes prohibiting gender discrimination in businesses or places of public accommodation.

Kiwanis clubs, for example, have admitted only men to membership since the group was founded in 1915. Local Kiwanis clubs have an average of thirty-eight members, a far cry from the 400 members of the Minneapolis chapter of the Jaycees in *Roberts*. *Kiwanis International v. Ridgewood Kiwanis Club*, 627 F. Supp. 1381, 1383 (D.N.J. 1986). See also Constitution and Bylaws of Kiwanis International (as

amended to and including June 26, 1984) ("Kiwanis Constitution and Bylaws"). Unlike the Jaycees, who make an active effort to recruit new members at the local, state, and national levels, *Roberts*, 468 U.S. at 613-14, the Kiwanis are selective in whom they admit to membership. Members of Kiwanis clubs must be engaged in or retired from "recognized lines of business, vocation, agriculture, institutional or professional life." Further, a member of another local Kiwanis club or another service club of similar character is not eligible for membership in a local Kiwanis club, except for honorary membership. Kiwanis Constitution and Bylaws.

One factor that influenced the Court's decision in *Roberts* was the control the Jaycees national headquarters exercised over local Jaycees chapters. See *Roberts*, 468 U.S. at 613-14. The structure of Kiwanis, however, is different. A man who joins a Kiwanis club does not join a national organization in the way a Jaycees member does. Instead, he joins a local Kiwanis club, which is intimate and selective in its choice of members. The average Kiwanis club has only thirty-eight members, and one of the stated objects of Kiwanis clubs is to foster enduring friendship among their members. See *Kiwanis*, 627 F. Supp. at 1388; Kiwanis Constitution and Bylaws. The local Kiwanis clubs as entities are members of Kiwanis International, which exists primarily to charter new clubs and to ensure that clubs abide by the Kiwanis Constitution and Bylaws. See Kiwanis Constitution and Bylaws.

Despite the differences between Kiwanis and the Jaycees, the district court in the *Kiwanis* case applied *Roberts* and held that the First Amendment did not

protect the membership choices of Kiwanis clubs. The decision of the California Court of Appeals in the instant case similarly overlooks the differences between the Jaycees and Rotary clubs.

Rotary clubs are similar to Kiwanis clubs in many respects. The primary purpose of Rotary is to encourage fellowship among business and professional men who are representative of the local community. Membership in Rotary clubs is by invitation only and is highly selective. Rotarians join local clubs, and the local clubs as entities are members of Rotary International. 1 *Rotary Basic Library, Focus on Rotary* 1-2.

The *Kiwanis* case and the instant case illustrate the need for this Court to point out some of the markers on the terrain of First Amendment protection for private organizations. Local Rotary clubs and Kiwanis clubs are intimate and selective. Unlike the Jaycees, they do not "sell" new memberships. Nor do they permit women to participate in their organizations as associate members. Rotary and Kiwanis clubs thus fall within the bounds of First Amendment protection, and, therefore, their right of intimate association is entitled to protection. The rights of other groups that are even more intimate and selective may be entitled to greater protection. Nevertheless, without further definition of the principles set out in *Roberts*, these groups may face the same fate in federal and state courts that the Rotarians did in the instant case.

Because local Rotary and Kiwanis clubs are intimate associations, the First Amendment's guarantee of freedom of association prevents the State from interfering with their membership decisions, absent a

compelling justification. In *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974), the Court held that the actions the State may take against groups with selective memberships is very limited, even if these groups discriminate on the basis of race. Specifically, the Court concluded that the State may not exclude such a group from a public park merely because it has an "all-Negro, all-Oriental, or all-white" membership policy. 417 U.S. at 575. The Court quoted with approval the dissenting opinion of Justice William O. Douglas joined by Justice Thurgood Marshall (417 U.S. at 575) in *Moose Lodge No. 107 v. Irvis*:

My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

407 U.S. 163, 179-80 (1972) (footnote omitted). Justice Blackmun in *Gilmore* explained why freedom of association should protect groups that restrict their membership:

The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and ensures peaceful, orderly change.

*Gilmore*, 417 U.S. at 575.

In *Roberts*, the Court recognized that the protection the Constitution affords to intimate groups is equivalent to the protection it affords to the family relationship. "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. *E.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)." *Roberts*, 468 U.S. at 618. Such relationships qualify for constitutional protection because they cultivate shared ideals and beliefs, thus acting as buffers between the individual and the power of the State. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (freedom to marry is a fundamental personal liberty);<sup>2</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion) (right of extended family to live together is constitutionally protected); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1973) (right of Amish parents to dictate education of their children according to their beliefs is constitutionally protected); *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965) (state interference in procreative

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<sup>2</sup> *See also* *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).



choices is unconstitutional); *Pierce v. Society of Sisters*, 268 U.S. at 535 (state may not prohibit parents from educating their children in private schools). See also *Gilmore v. City of Montgomery*, 417 U.S. at 575; *NAACP v. Alabama*, 357 U.S. 449, 80-62 (1958).

The Court in *Roberts* also recognized that it is appropriate to afford intimate relations constitutional protection because people derive much of their emotional enrichment from close ties with others and "[p]rotecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty. See, e.g., *Ouillein v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977); *Carey v. Population Services International*, 431 U.S. 678, 684-686 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)." *Roberts*, 468 U.S. at 619.

It is appropriate to afford the same constitutional protection to private clubs such as Rotary and Kiwanis, because their members share ideals and beliefs and seek to form close relationships with one another. Nevertheless, because the *Roberts* opinion does not set any clear boundaries of First Amendment protection for such groups, state and federal courts fail to protect these groups' constitutional rights. Consequently, this Court should take the opportunity to define these boundaries by noting probable jurisdiction in this case and ordering briefs on the merits and oral argument.

**II. STATUTES SUCH AS THE UNRUH ACT, AS THE COURTS APPLY THEM TO PRIVATE ORGANIZATIONS, VIOLATE THE CONSTITUTIONAL RIGHT OF MEMBERS OF THOSE ORGANIZATIONS NOT TO BE ASSOCIATED WITH A VIEW-POINT TO WHICH THEY OBJECT, AND THEY FORCE CLUB MEMBERS TO CHOOSE BETWEEN THEIR CONSTITUTIONAL RIGHTS OF FREE SPEECH AND FREE ASSOCIATION**

This Court should note probable jurisdiction in this case because decisions like that of the Court of Appeals often force members of private clubs to choose between their right to associate with intimate friends of their choice and their right not to be connected with a message they find objectionable. "[G]overnment may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation*, 461 U.S. 540, 545 (1982) (Rehnquist, J.) (citing *Perry v. Sinderman*, 408 U.S. 593 (1972) and *Speiser v. Randall*, 357 U.S. 513 (1958)); *FCC v. League of Women Voters*, 468 U.S. 364 (1984). The Court of Appeals' decision forces a more egregious decision on members of Rotary clubs other than the Duarte club: they must decide whether they will continue to associate with other members of their club or whether they want people to connect them with the position that women should be members of Rotary clubs, a position with which they may disagree. If it means anything for a person to have a constitutionally protected right, it means the State may not force him to make such a choice.

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705,



714 (1977) (Burger, C.J.). See also *Pacific Gas and Electric Co. v. Public Utilities Commission*, 54 U.S.L.W. 4149 (1986) (unconstitutional for a state to require a utility to distribute in its billing envelopes literature with which it disagrees); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (statute that required newspapers to publish replies of candidates whom they had criticized held unconstitutional); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34, 642 (1943) (compulsory flag salute held unconstitutional). In *Wooley*, the Court held that New Hampshire could not prosecute Jehovah's Witnesses for covering the state motto, "Live Free or Die," on their automobile license plates. The Jehovah's Witnesses objected to the slogan on political, religious, and moral grounds. The Court held that government could not force the Jehovah's Witnesses to be the instrument for a message they found unacceptable. "In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.' " *Wooley*, 430 U.S. at 715 (quoting *Barnette*, 319 U.S. at 624).

Court orders that prevent private organizations from excluding from their membership groups who refuse to abide by the organizations' membership requirements place the members who prefer to abide by the requirements in a position analogous to that of the Jehovah's Witnesses in *Wooley*. In addition to other requirements, Rotary and Kiwanis clubs have always restricted their membership to men. Other private organizations limit their membership on the basis of other subjective or objective criteria. These organizations have invested time, money, and energy over

the years to develop the reputation their names and identifying insignia convey to the public. That reputation includes their membership restrictions, and, in some cases, these restrictions are based on gender. Nonetheless, because of the Court of Appeals' decision in the instant case, when Rotarians attend their local club meetings, wear a Rotary shirt, or do anything else connected with Rotary, some people may believe they favor admitting women to Rotary clubs. The existence of this lawsuit indicates that some Rotarians consider this message unacceptable.

Most people who saw New Hampshire's motto on the Jehovah's Witnesses' license plates probably would not have assumed the Jehovah's Witnesses advocated or even accepted the philosophy of the motto. Nevertheless, the Court in *Wooley* found it sufficient that some person might connect them with the message they found unacceptable. See 430 U.S. at 715.

Similarly, most people probably would not assume that a local Rotary club member advocates admitting women simply because he wears the same Rotary symbol that members of the Rotary Club of Duarte wear. All that *Wooley* requires, however, is that some person might make that assumption. The Rotarians might be able to alleviate the problem somewhat by publishing a disclaimer, but that is also inadequate under *Wooley*. The Court implicitly rejected the argument that the Jehovah's Witnesses could put a disclaimer next to the license plate. See 430 U.S. 714-15. Likewise, in *Pacific Gas and Electric Co.*, the Court considered it inadequate protection that authors of opposing viewpoints had to indicate that their messages were not those of the utility and that the utility had the opportunity to respond to the messages. See

54 U.S.L.W. 4151, 4154. Government may not force upon someone the appearance of believing something he does not in fact believe:

The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society—as in the case of compulsion to give evidence in court.

*Barnette*, 319 U.S. at 645 (Murphy, J., concurring).

So long as dissident groups such as the Rotary Club of Duarte do not use their parent organization's name or insignia, there is no danger that people will think other members of the organization are in favor of altering the organization's membership requirements. The parent organizations do not seek to force the dissident groups to disband. All they ask is that dissident groups do not identify themselves with the parent organization when they violate the membership requirements of the organization.

Decisions such as that of the Court of Appeals in the instant case not only force members of private organizations to be associated with a viewpoint to which they object; they also force these members to choose between their constitutionally protected right of association and their constitutionally protected right of free speech. These members must either leave their local club, of which they may have been a member for years, or they must risk being associated with a position that they consider objectionable. A state's

interest in eliminating discrimination cannot be so strong as to force people to make such a choice. If the government may not require a person to give up a constitutionally protected right to receive a benefit, *FCC v. League of Women Voters*, 468 U.S. 364; *Regan*, 461 U.S. at 540; *Perry*, 408 U.S. 593; *Speiser*, 357 U.S. 513, it may not require a person to give up one constitutional right to exercise another.

Because the decision of the Court of Appeals in the instant cases forces Rotarians to be associated with a viewpoint to which they object, and because it forces them to choose between their constitutionally protected right of association and their constitutionally protected right of free speech, this Court should note probable jurisdiction in this case and Order briefs on the merits and oral argument.

### CONCLUSION

According to the factors this Court announced in *Roberts*, the freedom of association of members of many private organizations is protected by the First Amendment because the organizations are small in size, selective in membership, and seek to foster fellowship among their members. Local Rotary clubs are one example of groups to whom this protection should extend. Nevertheless, decisions such as that of the Court of Appeals in the instant case deny this protection to these organizations. Such decisions also violate the right of members of private organizations not to be associated with a viewpoint to which they object, and they force these members to choose between their constitutionally protected rights of free speech and free association.

The Court could better protect the constitutional rights of private organizations by further defining the boundaries of First Amendment protection for such groups. Such definition was unnecessary in *Roberts* because the Jaycees fell clearly outside these boundaries. Many groups, however, including Rotary clubs, fall within them, and this Court should avail itself of the opportunity to protect their constitutional rights. Recalling Justice Brandeis' famous words --

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

\* \* \* \*

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men [and women] of zeal, well-meaning, but without understanding.<sup>3</sup>

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<sup>3</sup> *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting).



--This Court should note probable jurisdiction in this case and Order briefs on the merits and oral argument.

Respectfully submitted,

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No. 86-421

Supreme Court, U.S.  
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# In the Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF  
ROTARY INTERNATIONAL, et al.,

*Appellants,*

v.

ROTARY CLUB OF DUARTE, et al.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA,  
SECOND APPELLATE DISTRICT

**Brief of The International Association of Lions Clubs  
As Amicus Curiae In  
Support of Appellants' Jurisdiction Statement**

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**In the Supreme Court  
of the United States**

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OCTOBER TERM, 1986

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BOARD OF DIRECTORS OF  
ROTARY INTERNATIONAL, et al.,

*Appellants,*

v.

ROTARY CLUB OF DUARTE, et al.,

*Appellees.*

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ON APPEAL FROM THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA,  
SECOND APPELLATE DISTRICT

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**Brief of The International Association of Lions Clubs  
As Amicus Curiae In  
Support of Appellants' Jurisdiction Statement**

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## **INTEREST OF AMICUS CURIAE**

The International Association of Lions Clubs ("Lions" or "amicus") is an international organization of member Lions clubs. Lions shares with Rotary International ("Rotary") the principal purpose of fellowship in service. Founded in 1917, Lions presently has approximately 37,000 clubs, with more than 1,350,000 members in more than 160 countries. Of these, approximately 15,000 clubs, with approximately 550,000 members, are located within the United States. Lions clubs, like Rotary clubs, are relatively small, averaging 37 members per club both nationally and internationally.

Lions is governed by a written constitution which requires that only males of legal majority and good moral character may be considered for membership in a Lions club. The constitution requires that membership in a Lions club be by invitation only and that the club thoroughly investigate the background of any person proposed for membership. The constitution also provides that it may be amended by a two-thirds vote of the registered delegates voting at an International Convention.

Lions initially emphasized the promotion of individual business interests of club members, but that soon changed. Since the first convention in 1917, a major tenet of Lionism has been that no Lions club may hold out the financial betterment of its members as a purpose of the club. Today the Lions constitution requires that no Lions club member or Lions organiza-

tion "use the membership relationship for any solicitation promoting private commercial benefits."

Lions, like Rotary and other service clubs, has recently become involved in state public accommodation act litigation. Actions are currently pending in Oregon and Michigan. In Oregon, the Oregon Court of Appeals (the intermediate appellate court) recently upheld a trial court finding that Lions is a business and therefore a "public accommodation." *Lloyd Lions Club v. Int. Assoc. of Lions Clubs*, 81 Or. App. 151, 724 P.2d 887 (1986).<sup>1</sup> (Appeal to the Oregon Supreme Court is currently under consideration.) In Michigan, the federal district court has granted the plaintiffs' motion for a preliminary injunction enjoining Lions to restore the club charter of the plaintiff Lions club. *Rogers, et al. v. International Association of Lions Clubs*, No. 36-CV-60117-AA (E.D. Mich.). The court held that Lions is a public accommodation under Michigan law, but did not discuss whether the First Amendment protects Lions' right to set its own membership policy.

These cases may reasonably be presumed to presage increased litigation in other jurisdictions. Amicus thus has great interest in the disposition of Rotary's appeal from *Rotary Club of Duarte v. Board of Directors*, 224 Cal. Rptr. 213 (Cal. App. 1986). Summary disposition

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<sup>1</sup>Not only did the court rule that Lions is a public accommodation in Oregon and therefore that Lions' membership policy violates state law, but the court also held that this violation, without more, subjects Lions to punitive damages. As a result, single-sex clubs and associations in Oregon are now liable for punitive damages for exercising First Amendment rights of association.



of this appeal (even summary reversal of the court below) will leave amicus, its potential adversaries, and courts throughout the land without a clear picture of this Court's present thinking on the strength of the constitutional guaranty of freedom of association. Amicus urgently requests, therefore, that the Court accord plenary consideration to this appeal.

### **SUMMARY OF ARGUMENT**

The First Amendment rights of many private nonprofit clubs and associations are increasingly called into question by a combination of an expansive reading of state public accommodation acts and a disregard of the specific teachings of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Courts, including the California court below, display a willingness to wave the *Roberts* decision like a magic wand causing constitutional guarantees of freedom of association to vanish whenever a state asserts the elimination of sex discrimination as a countervailing interest. The instant case provides an excellent example of this growing phenomenon. This Court should allow full review of Rotary's appeal in order to clarify *Roberts* and to articulate anew in the context of the most recent challenges to associational freedom the right of Americans to associate for legitimate purposes with whomever they choose.

**ARGUMENT**

Amicus endorses Rotary's Jurisdictional Statement and here focuses on a single point: the basis on which *Roberts* held that Minnesota's public accommodation law properly supersedes the Jaycees' First Amendment right of association is *not* the basis upon which the California Court of Appeal concluded that its state's law applies to Rotary without constitutional offense.

This case, as did *Roberts*, presents a conflict between a state's effort to eliminate gender-based discrimination and the constitutional right of association of a private organization. In *Roberts* the Court found it "useful" to consider separate analyses of what it termed freedom of intimate association and freedom of expressive association. 468 U.S. at 618. As the Court recognized, however, these two "features of constitutionally protected association may \* \* \* coincide." 468 U.S. at 618. "In particular, [this may occur] when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor \* \* \*." 468 U.S. at 618. Amicus agrees that the analytical separation of aspects of associational right may not be applicable in the present instance. However, for purposes of emphasizing the need for full review by this Court of the California Court of Appeal decision, amicus adopts the *Roberts*' framework and restricts its comments to whether California has appropriately applied *Roberts*' reasoning on the issue of expressional association in the present instance.

*Roberts* observed that Minnesota's public accommodation act "reflects the State's strong

historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services." 468 U.S. at 624. Deeming this a legitimate state purpose, the Court relied on the findings of the Minnesota and federal courts that the Jaycees was publicly selling memberships which made available to members services otherwise commercially available. The Court concluded that this dominant commercial aspect of the Jaycees disqualified it from the First Amendment protection to which it otherwise would have been entitled.

The avowed and undisputed purpose of the Jaycees was the self-advancement of its members. See, e.g., 52 U.S.L.W. 3785, 3786 (1984) (reporting that at oral argument, counsel for the Jaycees maintained that "the central reason for [the] existence" of the Jaycees was "the advancement of the interests of young men \* \* \*"). The federal district court stressed that "[t]he Jaycees considers itself to be a young men's leadership training organization \* \* \*." *United States Jaycees v. McClure*, 534 F. Supp. 766, 769 (D. Minn. 1982). The Eighth Circuit found "the similarities [between the Jaycees and] the Dale Carnegie organization [to be] plain." *United States Jaycees v. McClure*, 709 F.2d 1560, 1569 (8th Cir. 1983). Moreover, the Minnesota hearing examiner, the original fact finder in this case, concluded that "the Jaycee organization is different from other organizations in that it \* \* \* offers individual development programs in the areas of personnel, leadership and communications dynamics which are either unavailable or not available to the same degree

in other organizations." (Findings of Fact, No. 25. This report is included in the appendix to the jurisdictional statement submitted in *Roberts*; see 468 U.S. at 616.)

In addition, the Jaycees engaged in active and unselective solicitation of new members. The federal district court found: "One of the major activities of the Jaycees is the sale of memberships \* \* \* [and it] offers no selection criteria for members, save age and sex." 534 F. Supp. at 769. Likewise, the Minnesota Supreme Court specifically found that the Jaycees "encourages continuous recruitment and discourages the use of any selection criteria \* \* \*." *United States Jaycees v. McClure*, 305 N.W.2d 764, 771 (Minn. 1981). On these facts the Minnesota Supreme Court held that the Jaycees was a public business: The Jaycees sold "membership[s] in an organization whose aim is the advancement of its members," 305 N.W.2d at 769, and was "unselective in those to whom it sells its memberships," 305 N.W.2d at 771.

Given the Jaycees' dominant commercial nature—i.e., given the purpose and practice of the Jaycees to make publicly available "commercial programs and benefits," 468 U.S. at 626—this Court held that the First Amendment did not exempt the Jaycees from the application of Minnesota's public accommodation legislation.

The California appellate court has ignored this specific reasoning of *Roberts*. The California court held without elaboration that "infringement of [Rotary's First Amendment right] is clearly justified by this

state's compelling interest in abolishing sex discrimination by business establishments." 224 Cal. Rptr. at 231. "Business establishment" is a statutory term; California's public accommodation statute defines public accommodations to include "all business establishments of every kind whatsoever." See 224 Cal. Rptr. at 219. The California court's holding that Rotary is a business establishment, however, does *not* derive from a finding that Rotary makes "commercial programs and benefits" publicly available.

The California court offered two bases for its conclusion that Rotary is a business establishment; neither involves a finding that Rotary denies citizens of California equal access to publicly available goods and services. The first of these is the contention that Rotary "has sufficient businesslike attributes to render it a business establishment" under California law. 224 Cal. Rptr. at 224. The California court provides four reasons for this claim. The first derives from Rotary's "organizational structure." The court describes Rotary as an organization "administered by [a] Board which consists of 17 members which controls and manages the affairs and funds of [Rotary]." 224 Cal. Rptr. at 222. The court then in effect works its way through an organization chart of Rotary, describing positions and responsibilities, see 224 Cal. Rptr. at 222-223, and concludes that "this brief overview clearly establishes that [Rotary] is an organization which exhibits substantial businesslike attributes." 224 Cal. Rptr. at 223.



Manifestly, this reasoning does not implicate the purpose of public accommodation legislation to eliminate discrimination in publicly available goods and services. Moreover, the reasoning is patently overbroad, since it would apply to any large, well-organized association, no matter what its purposes or practices.

Second, the court states that "[c]ommercial attributes and advantages \* \* \* become obvious when the functions and responsibilities of the communications division of the secretariat are scrutinized." 224 Cal. Rptr. at 223. In this regard, however, the court mentions only that this division publishes "a wide range of Rotary books, manuals, pamphlets [sic], and periodicals." 224 Cal. Rptr. at 223. The court does not suggest, for instance, that Rotary is in the business of selling such publications to the general public. Thus, the court's second observation, like its first, does not support a claim that Rotary discriminates in providing publicly available goods or services.

The court's third and fourth points are that Rotary licenses the use of the Rotary emblem to firms which manufacture items bearing the Rotary emblem for sale to Rotarians, and that Rotary publishes a directory, which in addition to listing all clubs with the time and place of meetings, also lists hotels owned or operated by Rotarians or which are meeting places or headquarters of Rotary clubs and firms which have been licensed to manufacture or sell Rotary-approved items. But, once again, it is apparent that however the court believes that such considerations show that Rotary is a "business establishment" for purposes of

California law, the cited facts are unrelated to those purposes and practices of the Jaycees which formed the factual predicate for the holding in *Roberts*. In sum, although Rotary arguably has certain "businesslike attributes," it does not sell commercially valuable services to the general public.

The California court's second basis for its holding that Rotary is a business establishment is that Rotary has "provided a forum which encourages business relations to grow and which enhances the commercial advantages of its members." 224 Cal. Rptr. at 226. The court acknowledges that "official policy promulgated by [Rotary] \* \* \* 'specifically prohibits any attempt to use the privilege of membership for commercial advantage.' " 224 Cal. Rptr. at 225. The court also recognizes that the trial court held that the advantages of enhanced business contacts were " 'incidental to the principal purposes of the association which are to promote fellowship for *noncommercial* and *noneconomic* objectives [trial court emphasis] and to secure the voluntary uncompensated participation of business and professional men' in services and activities performed on a local, national and international level." 224 Cal. Rptr. at 224. The appellate court, however, upon independent review of the evidence in the record, concluded that such benefits were "substantial" and warranted the conclusion that Rotary was a business establishment.

Ignoring the court's arrogation to itself of unusual powers of review, its assessment of the evidence does not imply that Rotary discriminates in the provision



of publicly available goods and services. The court for instance does not conclude (as did the Minnesota Supreme Court of the Jaycees) that member clubs indiscriminately recruit new members from the general public.

*Roberts* rests its result on the evaluation that an organization which makes commercially valuable goods or services publicly available cannot claim First Amendment protection against a state's demand that the organization refrain from discriminating in its membership policies; if an association has a dominant commercial purpose, it must make its publicly provided goods and services available on a nondiscriminatory basis. Rotary's membership policies, as well as those of many other service clubs, cause no affront to the rationale of *Roberts*. Although such associations as Rotary, Lions, Kiwanis, and Soroptimist engage in gender discrimination in their membership policies, these organizations do not discriminate "in the allocation of publicly available goods and services." Indeed, *Roberts* itself suggests the distinction between organizations such as Jaycees, which in purpose and practice provides commercially valuable services to club members, and service organizations such as Rotary, Lions, Kiwanis, or Soroptimist, whose public purpose is community service and whose long-standing policies are that members shall not use their clubs for their personal business benefit. If a state law allows that mere size and organizational structure can subject a private organization to the requirements of a state public accommodation statute, or if the nonpurposeful (and incidental) opportunity to make business contacts is sufficient to convert a private nonprofit organization

into a "business establishment," such a state law would be susceptible of an overbreadth challenge. When the Jaycees raised such an overbreadth challenge, the Court responded: "[W]e need only note that the Minnesota Supreme Court expressly rejected the contention that the Jaycees should 'be viewed analogously to private organizations such as the Kiwanis International organization.' " 468 U.S. at 630. Apparently this Court is prepared to distinguish the Jaycees from organizations such as Rotary and Kiwanis along lines not considered by the California court.

In *Roberts*, this Court explained that "acts of invidious discrimination in distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent \* \* \*," 468 U.S. at 628. Amicus concurs. However, lower courts are taking this statement of principle as a license to regulate the membership policies of associations which by no stretch of the imagination discriminate in the distribution of publicly available goods or services. This is true of the California court in the instant case, and it is true in differing ways of the Oregon Court of Appeals in *Lloyd Lions Clubs v. Int'l. Assoc. of Lions Clubs* and the Federal District Court of New Jersey in *Kiwanis Intern. v. Ridgewood Kiwanis Club*, 627 F. Supp. 1381 (D. N.J. 1986). As a result, the rights of United States citizens to associate with whom they choose for noncommercial purposes and to engage in otherwise constitutionally protected activity are everywhere in danger. Further guidance from this Court on the scope of *Roberts* is urgently required.

## CONCLUSION

Amicus, like Rotary, is committed to private charity and community service. At present, however, a cloud of uncertainty hangs over the question whether such private service organizations may continue to adhere to chosen membership policies in proceeding with their humanitarian endeavors. Decisions like that of the California court below invite challenges to the membership policies of other clubs and associations in California and elsewhere. All the while the constitutions of Rotary, Lions, and other similar organizations decree single-sex membership policies (while detailing procedures for changing those policies). The result is, and will be, litigation in which no possibility for compromise and settlement is possible—litigation, furthermore, which consumes resources otherwise available for charitable purposes. Ultimate resolution of this litigation, lies with this Court's understanding of the meaning and scope of the oft-recognized constitutional right of association. This case affords the

Court an excellent opportunity for much-needed post-*Roberts* clarification of this right. Amicus urges the Court to note probable jurisdiction of Rotary's appeal.<sup>2</sup>

Respectfully submitted,

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October 15, 1986

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<sup>2</sup>Written consent of the parties accompanies this brief.

No. 86-421

Supreme Court, U.S.

FILED

OCT 14 1986

JOSEPH F. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1986

— 0 —  
BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, *et al.*,  
*Appellants,*

v.

ROTARY CLUB OF DUARTE, *et al.*,  
*Appellees.*

— 0 —  
**APPEAL FROM THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT**

— 0 —  
**BRIEF OF THE STATE OF CALIFORNIA  
AS AMICUS CURIAE IN SUPPORT OF  
APPELLEES' MOTION TO DISMISS OR AFFIRM**

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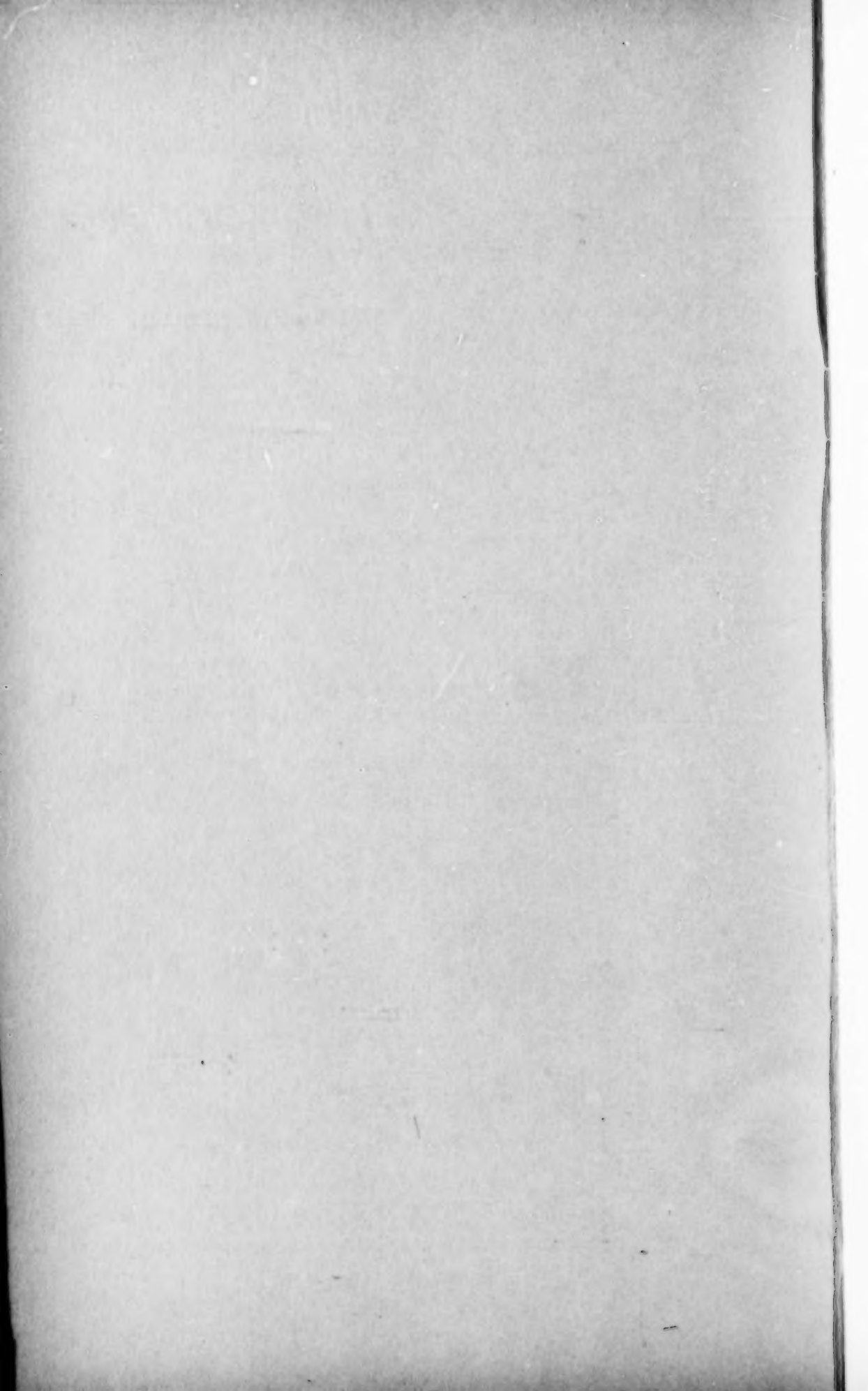
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BOARD OF DIRECTORS OF ROTARY  
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**APPEAL FROM THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
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---

**BRIEF OF THE STATE OF CALIFORNIA  
AS AMICUS CURIAE IN SUPPORT OF  
APPELLEES' MOTION TO DISMISS OR AFFIRM**

---

**INTEREST OF AMICUS CURIAE  
STATE OF CALIFORNIA**

The State of California, by its Attorney General John K. Van de Kamp, respectfully submits this brief as amicus curiae pursuant to Supreme Court Rule 36.4.

Within the federal system, states have long played an essential role in prohibiting discrimination by private enterprises affected with a public interest. In California, this common law doctrine first received statutory recognition in 1897 (Cal. Stats. 1897, ch. 108, § 1, p. 137), and is now codified in the Unruh Civil Rights Act, California

Civil Code § 51 (Cal. Stats. 1959, ch. 1866, § 1, p. 4424). *In re Cox*, 3 Cal.3d 205, 212-214 (1970). Many states, including California, enacted statutes forbidding discrimination by public accommodations in response to the holding in the *Civil Rights Cases*, 109 U.S. 3 (1883), that the federal government had no power to prohibit such private discrimination. *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 33 (1948).

Appellants herein challenge the application of the Unruh Civil Rights Act to prohibit discrimination on the basis of sex by a large association of private clubs and also contend that the Unruh Act is unconstitutionally vague and overbroad. The State of California has a direct and compelling interest in preserving its statute and therefore urges this court to grant appellees' motion to dismiss the appeal, or, in the alternative, to affirm the decision of the court below.

The State of California has a strong interest in preserving the broad interpretation of the Unruh Act expressed in the decision below by the California Court of Appeal. The court's interpretation is consistent with the common law of California and with the legislative decision to codify the common law. Furthermore, the State of California, as expressed in Article I, § 8 of the California Constitution<sup>1</sup> has a strong public policy of ensuring that business opportunities are not denied on the basis of sex.

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<sup>1</sup>Article I, § 8 of the California Constitution provides "a person may not be disqualified from entering or pursuing a business, profession, vocation or employment because of sex, race, creed, color, or national or ethnic origin."

## STATEMENT OF THE CASE

In 1977, the Rotary Club of Duarte (Duarte) admitted three women as members. Rotary International then revoked Duarte's charter as a local Rotary Club and terminated its membership in Rotary International, claiming that Duarte had violated its obligation to abide by the rules of Rotary International. These rules require local Rotary Clubs to limit membership to men.

Duarte, together with two of its women members, sued Rotary International for injunctive and declaratory relief, seeking to enjoin Rotary International from revoking Duarte's charter and from enforcing the male-only membership rule, and seeking a declaration that the male-only rule violated the Unruh Civil Rights Act, California Civil Code section 51, and Article 1, § 8 of the California Constitution.

The Los Angeles County Superior Court ruled in favor of Rotary International finding that it had not violated the Unruh Act. The Court of Appeal reversed, concluding that Rotary International was a business establishment within the meaning of the Unruh Act and thus was prohibited from discriminating on the basis of sex.

The Court of Appeal denied Rotary International's petition for rehearing and the California Supreme Court denied its petition for review.

## SUMMARY OF ARGUMENT

This case does not present a substantial federal question. It involves issues that were decided by this Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and presents no facts that would distinguish it from the rule of that case.

Rotary International is not the type of organization whose members, according to *Roberts*, may assert first amendment rights of intimate and expressive association. Indeed Rotary International has no human members as it is an association of membership clubs. Based on this fact and its substantial business-like attributes, the state Court below, consistent with *Roberts*, found that Rotary International could not insulate its policy of discriminating on the basis of sex in membership from operation of the Unruh Civil Rights Act which prohibits such discrimination. The court also concluded, consistent with *Roberts*, that any first amendment rights of Rotary International were outweighed by California's compelling state interest in eliminating discrimination on the basis of sex which might impede the female citizens of the state in pursuing a business or profession. —

Rotary International may not raise the question of whether the Unruh Act is unconstitutionally vague or overbroad in this Court as it failed to timely raise the issue in the state court. Rotary International may not assert that the Unruh Act is unconstitutionally vague because the statute is not vague as applied to it. Finally, the Unruh Act is not unconstitutionally overbroad.



## ARGUMENT

### I. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

#### A. Rotary International Cannot Assert a Constitutional Right of Intimate Association.

This case presents issues already decided by this Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). That decision held that the constitution protects freedom of association in two forms—freedom of intimate association and freedom of expressive association. 468 U.S. at 617-618. According to the court, “certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme” (468 U.S. at 617-618) and the Constitution guarantees a right to associate for the purpose of engaging in activities protected by the first amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. However, the court upheld application of the Minnesota public accommodations statute which prohibited the Jaycees from denying full membership to women because the Jaycees was not an organization which could assert a constitutional right of intimate association and Minnesota’s compelling interest in prohibiting discrimination against its female citizens justified any impact on the Jaycees’ freedom of expressive association.

The decision of the California Court of Appeal below is consistent with this Court’s decision in *Roberts* and merely involve application of the principles in *Roberts* to

a slightly different factual setting. In *Roberts* this Court determined that local chapters of the Jaycees were large and unselective groups which permitted strangers to participate in their activities and therefore could not assert a constitutional right of intimate association to justify their exclusion of women from full membership.

Similarly, the court below determined that Rotary International exhibited "substantial businesslike-attributes" and was therefore subject to the Unruh Civil Rights Act which prohibits discrimination on the basis of sex by "all business establishments of any kind whatsoever." App. C-17-22. Rotary International is a nonprofit corporation which has no human members, but is comprised of 19,788 local clubs which together have approximately 907,750 members. App. C-5. Membership in local clubs is limited to business and professional *men*. App. C-6. The average size of a local club is 50 members but clubs range in size from 20 to 900 members. App. G-60. Meetings of local clubs are generally held in public hotels and members may invite male non-members to attend meetings. App. G-25.

Rotary International publishes a magazine to which each local club member must subscribe, licenses private firms to use its emblem on manufactured goods and collects royalties from the sale of those goods, and publishes a directory listing the licensed firms. App. C-20-22. Based on these facts, the court below concluded that Rotary International has sufficient business-like attributes

to render it a business establishment within the meaning of the Unruh Act.

The court also noted that "there are substantial business benefits to be gained by belonging to an organization such as Rotary which is comprised of community business and professional leaders." App. C-22. Because Rotary International has provided a forum which encourages business relations to grow and enhances the commercial advantages of its members it and Duarte were found to be business establishments within the meaning of the Unruh Act. App. C-27.

Necessarily, a conclusion that an organization is a business within the meaning of the Unruh Act entails a conclusion that it is not the sort of organization which may assert a constitutional right of intimate association. Of course, Rotary International has no human members and thus, cannot assert any such right. Duarte, based on the criteria outlined by this Court in *Roberts*, arguably could<sup>2</sup> but it does not complain that its rights of association are violated by application of the Unruh Act. It voluntarily chose to admit women and was punished by International Rotary for doing so.

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<sup>2</sup>In *Roberts* this Court noted that attributes such as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship might give rise to a constitutional right of freedom of intimate association but that "[c]onversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection." 468 U.S. at 620.

## **B. Constitutional Guarantees Do Not Protect Private Discrimination.**

Although the Constitution does recognize rights of intimate and expressive association, these constitutional guarantees have never been held to include an affirmative right to discriminate.

To the contrary, this Court has held on numerous occasions that private discrimination is unworthy of constitutional protection. This issue was first addressed by the Court in the context of discrimination by labor organizations. In *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945) this Court upheld the application of New York's fair employment law to such an organization, rejecting the defense that such discrimination was protected against state interference by the fourteenth amendment. This Court's refusal to extend constitutional protection to private discrimination continued in *Norwood v. Harrison*, 413 U.S. 455 (1973) where this Court affirmed that a state may not loan textbooks to a segregated school, saying:

“[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.” *Id.*, at 469-70.

Similarly, in *Runyon v. McCrary*, 427 U.S. 60, 176 (1976), holding that 42 U.S.C. § 1981 prohibits private schools from denying admission on the basis of race, this Court quoted the language cited above in *Norwood v. Harrison* and distinguished between the protected First

Amendment right to advocate segregated schools, and the asserted right to exclude students on the basis of race, rejecting the latter.

This issue was addressed most recently in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), where this Court upheld the application of Title VII to the partnership decisions of a law firm, rejecting the claim that regulation of the firm's employment practices violated constitutional guarantees. If any constitutional restrictions applied to the regulation of relationships which "touch or concern" rights of privacy or association, these restrictions would certainly be at their peak as to the intimate choice of partners in a law firm. Rotary International has no claim of an intimate relationship with the more than 900,000 local club members from whom it receives dues payments, and thus the Constitution does not protect its desire to discriminate on the basis of sex in membership.

While a constitutionally protected "zone of privacy" protecting private discrimination has been discussed by some members of the Supreme Court (see *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) and *Moose Lodge No. 7 v. Irvis*, 407 U.S. 163, 179-180 (1972) (Douglas, J., dissenting)), this proposition has never been applied by this Court to approve discriminatory practices. Indeed, this Court has consistently refused to interfere with state regulation of private discrimination.

Other state courts have held that private clubs may not discriminate in violation of state public accommodation statutes. See, e.g., *Commonwealth of Pennsylvania, Human Relations Commission v. Loyal Order of Moose*,

*Lodge No. 107*, 448 Pa. 451, 294 A.2d 594 (1972), appeal dismissed for want of a substantial federal question, 409 U.S. 1052 (1972), in which the same club discussed in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, was held subject to a state civil rights law; *B.P.O.E. Lodge No. 2043 of Brunswick v. Ingraham*, 297 A.2d 607, 614-615 (Me. 1972), appeal dismissed for want of a substantial federal question, 410 U.S. 903 (1972), in which the power of a state to regulate discrimination by a private club was again upheld; and, Note, *Section 1981 and the Thirteenth Amendment after Runyon v. McCrary*, 29 Stan. L. Rev. 747, 759 (1977) (“[P]rivate clubs cannot successfully claim either the right of association or the right to privacy.”).

Since assertions of constitutional protection for discriminatory membership and guest policies of truly private clubs have been rejected, there is certainly no such protection for Rotary International, an association of clubs which itself has no human members.

**C. If Any Constitutional Rights are Infringed,  
California has a Compelling Interest which  
Justifies Such Infringement.**

Assuming any constitutional rights are infringed by a state's prohibition of discriminatory membership practices, the validity of the state's action can only be determined after the state's interest is balanced against the nature and degree of the intrusion. As described in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), the analytical process the court must employ is to identify, evaluate and weigh the countervailing interests. As this Court concluded in *Roberts*:



The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms. [Citations omitted.] 468 U.S. at 623.

Public policy in California strongly favors elimination of discrimination based on sex. *Koire v. Metro Car Wash*, 40 Cal.3d at 36-37. The Unruh Act expressly prohibits sex discrimination by business enterprises and has been applied to invalidate policies that discriminate on the bases of sex and public accommodations. *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72 (1985).

As recognized in a landmark decision by the California Supreme Court, which led the nation in establishing that discrimination on the basis of sex is subject to the most rigorous scrutiny, "sex alone may not be used to bar a person from a vocation, profession or business." *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 8. The court further stated: "[T]he right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness." 5 Cal.3d at 17. The court below extended this concern to include the discriminatory policies of an association which



could impede women in achieving success in a business or profession.

Discrimination by membership organizations comprised of influential business and professional men has been criticized in numerous commentaries as one of the final hurdles barring the equal opportunity of all persons to develop their talents and thus benefit society.

Because prestigious clubs exert an enormous influence on our country's commercial and political life, the national commitment to equality of opportunity must override asserted interests in privacy and association. Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C.R.—C.L.L. Rev. 321, 324 (1983).

As the same writer concluded.

[W]hen a private club, whose members are highly influential in government, business and the professions, flatly denies membership to an entire class of persons . . . our nation ultimately suffers. Denying women the right to associate in this context inhibits their professional advancement, and, in turn, restricts their contribution to society." *Id.*, at 407.

See also Goodwin, *Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door*, 13 Sw. U. L. Rev. 237, 271 (1982); and Hollingsworth, *Sex Discrimination in Private Clubs*, 29 Hastings L. J. 417, 442 (1977).

Given the substantial detriment discriminatory membership policies cause both to the excluded group and to society as a whole, the elimination of such discrimination is certainly a compelling state interest. This is particularly true of a service organization such as Rotary Inter-

national, an organization of local clubs whose more than 900,000 members are influential business and professional men.

Measured against this substantial concern for equal opportunity for all, Rotary International's interest in maintaining its male-only membership appears insubstantial. While some of the organization's activities may be protected under the Constitution, there is absolutely no showing that the male-only policy is necessary for, or even related to the pursuit of those activities. Significantly, Rotary International does not claim that expressive activity is a major aspect of its purpose and function, so it cannot claim that its right to expression would be infringed if Duarte admits women as members.

On balance, the state's concern for promoting equal opportunity for all persons, for the benefit of both the individual and society as a whole, vastly outweighs any legitimate interest of Rotary International in maintaining a discriminatory membership policy.

## **II. INTERNATIONAL ROTARY MAY NOT CLAIM THAT THE UNRUH ACT IS VAGUE OR OVERBROAD.**

### **A. This Court Will Not Hear an Issue Not Raised in the State Courts Below.**

28 U.S.C. § 1257 which governs the jurisdiction of this Court "requires that in the state court petitioners have specially set up or claimed under the Constitution of the United States that right which they now seek to have this Court enforce." This Court has repeatedly refused to

consider a federal question which was not presented to the state courts below. *Webb v. Webb*, 451 U.S. 493, 495 (1981); *Cardinale v. State of Louisiana*, 394 U.S. 437, 438 (1969).

Rotary International never asserted that the Unruh Act was unconstitutionally vague or overbroad in the state courts. It did make an argument based on "uncertainty" in its petition for rehearing in the California Court of Appeal but under California law this issue was not timely raised (Rule 29 (b)(1), California Rules of Court). This Court will not hear a question that was not *timely* raised under state law. *Exxon Corp v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Bailey v. Anderson*, 326 U.S. 203, 205-207.

#### **B. The Unruh Act is Not Vague as Applied to Rotary International.**

Under the void for vagueness doctrine "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974). The Unruh Act expressly prohibits discrimination on the basis of sex. Rotary International sought to require Duarte to discriminate on the basis of sex, thus Rotary International cannot claim that the Unruh Act is vague as applied to it.

#### **C. The Unruh Act is Not Unconstitutionally Overbroad.**

Appellants argue that the Unruh Act is unconstitutionally overbroad because it has a chilling effect on the first amendment associational rights of all groups in California which are not open to the general public. This Court need not consider this claim.

This Court has applied the overbreadth doctrine “sparingly and only as a last resort” to strike down statutes which on their face may chill first amendment rights. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). This Court has stated its reluctance to strike down a statute on its face where it may be validly applied. Thus, in *Parker v. Levy*, 417 U.S. 734, where appellant’s actions fell within the questioned statute, this Court declined to find it overbroad stating:

“ . . . Thus even if there are marginal applications in which a statute would infringe on first amendment values, facial invalidation is inappropriate if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribed conduct. . . .” 417 U.S. at 760.

California courts have not interpreted the Unruh Act so as to chill the first amendment rights of intimate association and expressive association recognized by this Court in *Roberts*. Clearly the Unruh Act’s prohibition of arbitrary discrimination against defined classes of persons does not aim at suppressing first amendment rights. In *Roberts* this Court rejected the suggestion that discriminatory membership policies are themselves “symbolic speech” subject to first amendment protection. 609 U.S. at 627.

In *Roberts* the Jaycees argued that the Minnesota public accommodations statute was unconstitutionally vague and overbroad. Like the Unruh Act at issue herein the Minnesota statute prohibited discrimination by a “business”. 468 U.S. at 615. The Minnesota Supreme Court concluded that the Jaycees was a business because it sold goods and extended privileges in exchange for annual membership dues. 468 U.S. at 616. This Court held that the

Minnesota Act, as interpreted by its highest court, was not unconstitutionally vague and overbroad because “the Minnesota Supreme Court used a number of specific and objective criteria—regarding the organization’s size, selectivity, commercial nature, and use of public facilities—typically employed in determining the applicability of state and federal antidiscrimination statutes to the membership policies of assertedly private clubs.” 468 U.S. 629.

California courts have applied just such specific and objective criteria in determining that various organizations, including Rotary International, are subject to the Unruh Act’s prohibition of arbitrary discrimination. In *Isbister v. Boys’ Club of Santa Cruz, Inc.*, 40 Cal.3d 72, the California Supreme Court held that the Unruh Act prohibited the Boys’ Club from discriminating on the basis of sex because it provided an atmosphere deemed characteristic of a public accommodation, and members lacked a sense of “social cohesiveness, shared identity, or continuity”. 40 Cal.3d at 81-82. Similarly, in *Curran v. Mount Diablo Council of the Boy Scouts*, 147 Cal.App.3d 712 (1983), app. diss., 104 S.Ct. 3574 (1984), the court held that the Boy Scouts were subject to the Unruh Act because it, like the Boys’ Club, offered its facilities and membership to the general public. In addition to focusing on the public availability of membership and facilities, California courts have also held the Unruh Act to be applicable to organizations with commercial or businesslike attributes. *Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721 (large apartment complex); *O’Connor v. Village Green Owners Assoc.*, 33 Cal.3d 790, 795 (1983) (Condominium owners’ association which performed the customary functions of a landlord).

Thus, it can easily be discerned that the prohibitions of the Unruh Act will apply to just the sort of organizations described by this Court in *Roberts* as not being in the class of organizations whose rights of intimate and expressive association are protected by the first amendment and there is no risk that it will be applied "to a substantial amount of protected conduct." 609 U.S. at 631. Even if it is established that some clubs not open to the general public are subject to the Unruh Act, it does not follow that every private club will be. Those clubs which are truly intimate and personal and which have few or no commercial attributes are not subject to the Unruh Act and may continue to set such membership policies as they choose. Those whose major purpose is expressive activity subject to first amendment protection may set membership policies which are rationally related to their expressive activities. Under California court interpretations of the Unruh Act, the small group of intimate friends who gather to play poker have no fear that their right to freely and intimately associate will be disturbed by the long arm of the state even if they derive incidental business and professional benefits from their association.



# **CONCLUSION**

For the foregoing reasons, the State of California urges this Court to grant appellees' motion to dismiss the appeal or, in the alternative, to affirm the decision below.

Respectfully submitted,

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In The  
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BOARD OF DIRECTORS OF ROTARY INTERNATIONAL,  
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Appeal from the Court of Appeal  
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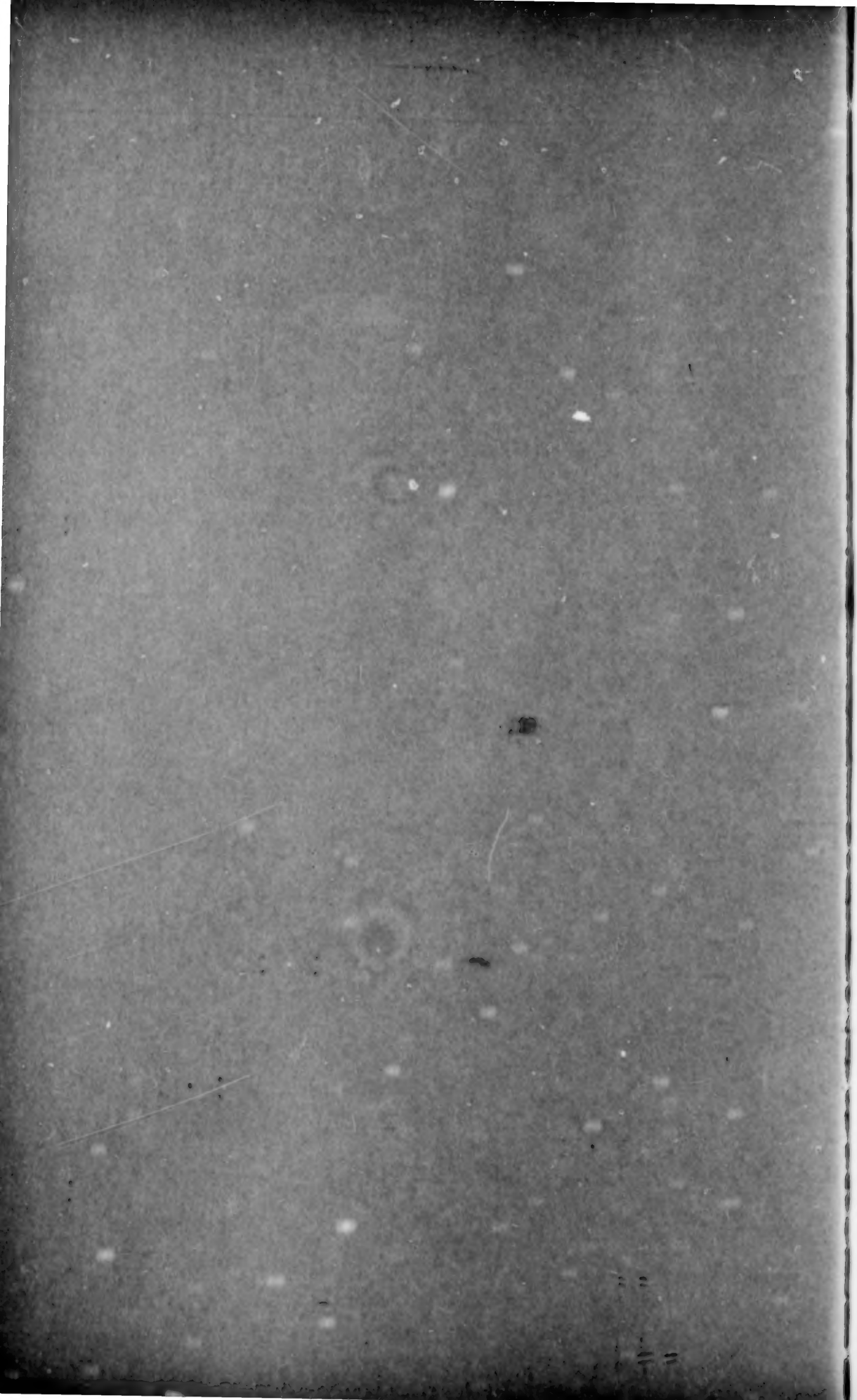
**BRIEF OF KIWANIS INTERNATIONAL AS  
AMICUS CURIAE IN SUPPORT OF  
JURISDICTIONAL STATEMENT**

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In The  
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*Appellants,*

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*Appellees.*

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Appeal from the Court of Appeal  
of the State of California,  
Second Appellate District

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**BRIEF OF KIWANIS INTERNATIONAL AS  
AMICUS CURIAE IN SUPPORT OF  
JURISDICTIONAL STATEMENT**

---

**INTEREST OF KIWANIS INTERNATIONAL**

Kiwanis International is an organization dedicated to providing community service, similar to the appellant Rotary International. Kiwanis International charters local Kiwanis Clubs and authorizes their use of the Kiwanis name and trademarks. There are some 8,200 Kiwanis Clubs which, in turn, are comprised of approximately 313,000 members throughout the United States and 75 foreign countries.

Like appellant Rotary International, no individual belongs to Kiwanis International. Rather, individuals belong to a local Kiwanis Club and the clubs in turn belong to Kiwanis International. In 1984, the members of local Kiwanis Clubs volunteered approximately 22 million hours of time for community service and raised approximately \$41.4 million for charity.

Members of Kiwanis Clubs are chosen only by the individual clubs themselves, and membership is highly selective. Like Rotary Clubs, membership is limited to men only and is by invitation only. Other criteria prospective members must satisfy include:

1. Being of good character and community standing, and either residing in or having other community interests within the area of the chartered club;
2. Being engaged in or retired from an occupation in a recognized line of business, vocation, agricultural, or institutional or professional life;
3. Being unaffiliated with any other service club of like character; and
4. Agreeing to participate regularly in the activities of the club.

Local Kiwanis Clubs may impose their own additional criteria, such as requiring prayer and recitation of the pledge of allegiance at meetings. An active club member must nominate an individual for consideration as a new member, and the board of directors of the local club must approve the prospective member before an invitation is extended. Like Rotary, membership in a Kiwanis Club is not transferable between clubs.

Since the first Kiwanis Club was founded on January 21, 1915, Kiwanis Clubs have limited their membership to men only. Resolutions to amend the Constitution and Bylaws of Kiwanis International to permit female members have been presented at international conventions of Kiwanis Clubs

several times in the past ten years. After considerable debate, all of these resolutions have been rejected by majorities of the delegates attending the conventions. Most recently, at the international conventions of Kiwanis Clubs in July, 1985 and again in July, 1986, such a resolution was presented to the delegates for consideration. After lengthy debate, the resolution was rejected on both occasions.

Kiwanis International has been and currently is involved in litigation arising out of factual situations similar to that of this case. See, e.g., *Kiwanis Int'l v. Ridgewood Kiwanis Club*, 627 F. Supp. 1381 (D.N.J. 1986), *appeal pending*, Nos. 86-5199, 86-5278 (3d Cir.); *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l*, 83 Misc. 2d 1075, 374 N.Y.S.2d 265 (1975), *aff'd*, 52 A.D.2d 906, 383 N.Y.S.2d 383 (1976), *aff'd*, 41 N.Y.2d 1034, 395 N.Y.S.2d 633, *cert. denied*, 434 U.S. 859 (1977). There are 584 Kiwanis Clubs in California with more than 22,000 members. The decision below involving Rotary directly threatens litigation against these Kiwanis Clubs and Kiwanis International on the ground that their male membership criterion violates California's Unruh Act. Since that decision, Kiwanis International has repeatedly been contacted by local clubs in California and their members, asking whether the decision and Act apply to Kiwanis, whether Kiwanis International will waive the male-only charter requirement for California Clubs (which it has no legal authority to do without approval by delegate vote at an international convention of clubs), and whether such clubs and their members may be exposed to punitive or other damages if they abide by their charter obligations to Kiwanis International. Kiwanis International has a further interest in that several other States have statutes susceptible of similarly expansive judicial constructions, in which instances the constitutional issues presented here likewise arise. See, e.g., *Kiwanis Int'l v. Ridgewood Kiwanis Club*, 627 F. Supp. at 1388-90; *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l*, 395 N.Y.S.2d at 633; *Lloyd Lions Club of Portland, Oregon v. The Int'l Ass'n of Lions Clubs*,

No. A8206-03941, slip op. (Or. Ct. App., Sept. 10, 1986).

### THE QUESTIONS ARE SUBSTANTIAL AND MERIT PLENARY REVIEW<sup>1</sup>

This case is worthy of plenary consideration for several reasons – the importance of the First Amendment associational rights involved, the number of people and organizations affected by the issues, the number of States with similar statutes, and the substantial gloss placed upon *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), by the court below.

Millions of Americans belong to private voluntary organizations organized along gender lines. Approximately 36 States have public accommodation laws similar to California's Unruh Act, and many of those statutes are susceptible of an expansive construction like that given to California's in this case. Much litigation has already occurred involving the same or similar issues as are presented in this case, and much more may confidently be predicted absent further guidance by this Court on the First Amendment rights of association presented.

The decision of the California court in this case gives lip service at best to most of the factors identified by this Court

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<sup>1</sup>The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(2). [Jurisdictional Statement, p. 2] It is difficult to judge from the Jurisdictional Statement at pp. 4-5 and the decision below, see *Rotary Club of Duarte v. Board of Directors of Rotary Int'l*, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213, 229 (1986), whether appellants presented the issue to the California courts in such a manner as to give rise to a right of appeal under § 1257(2). See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 113-14 (6th ed. 1986). If the Court determines that appellate jurisdiction does not lie pursuant § 1257(2), Kiwanis International respectfully urges the Court to consider the Jurisdictional Statement as a petition for writ of certiorari and to grant certiorari pursuant to 28 U.S.C. §§ 1257(3), 2103.

in *Roberts* as essential to the assessment of First Amendment rights of intimate association, and it fundamentally alters the focus of the one factor it emphasizes. The decision below likewise departs from this Court's test for assessing abridgement of the expressive aspects of the right of association, essentially demanding proof that the State-imposed membership criterion will cause the organization to disintegrate.

Finally, California's Unruh Act as construed by the courts of that State in this and other cases fails the standards for vagueness and overbreadth employed by this Court in *Roberts*. People of common or even superior intelligence must necessarily guess both at the meaning of "business establishment" as that term has been defined by the California courts, and at what membership criteria those courts will henceforth condemn as "arbitrary."

**I. This Case Presents Substantial Questions Under The First Amendment Arising Out Of A Recurring Fact Pattern And Of Vital Importance To Millions Of Americans.**

This case presents both the opportunity and the need for this Court to complement its earlier decision respecting rights of associational freedom under the First Amendment. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In particular, on the broad spectrum of human associational relationships, *Roberts* mapped with clarity the polar extremes where the State may and may not intrude consistently with the First Amendment. 468 U.S. at 618-20. At the same time, *Roberts* noted a "broad range" of relationships between those extremes. That case did not require the Court to "mark the potentially significant points on this terrain with any precision," and the Court "note[d] only [some] of the factors that may be relevant . . . ." *Id.* at 620. By complementing the decision in *Roberts*, the Court would discharge its duty to provide clear guidance to lower courts, members of the bar, and citizens of the United States on the extent of what many



of them historically have believed and continue to believe is one of our Nation's basic freedoms.

Millions of Americans have historically chosen and continue to choose to devote substantial portions of their lives and efforts to voluntary groups organized for a broad array of purposes, from relatively well-known service clubs such as Rotary and Kiwanis, to fraternal organizations such as the Elks, Moose and various Masonic orders, to national and local ethnic and nationality organizations, to relatively obscure and local social and recreational clubs. For many if not most of these groups and their members, the ability to choose their associates is an essential component of this voluntarism, and a wide range of selective membership criteria is utilized, from age and residence to profession or occupation to religion, nationality and ethnic background. *See generally, Encyclopedia of Associations* (19th ed. 1984). These private and voluntary organizations historically have made and continue to make a substantial contribution to the richness and diversity of American social, cultural and civic society.

Many of these groups have used and continue to use gender as a membership criterion. For each service club such as Rotary and Kiwanis which limits its membership to males, there is or is likely to be a Junior League or Zonta that limits its membership to females. Indeed, the *Encyclopedia of Associations* (19th ed. 1984) lists as many as 68 service organizations alone that are open only to one sex. This "service" category does not include nationwide fraternal organizations such as the Shriners (male), the various other Masonic orders (one sex or the other) and the General Federation of Women's Clubs (female), or local organizations such as the Cosmos Club (male) and the Congressional Club (female), let alone a wide variety of other social, recreational, ethnic and political clubs.<sup>2</sup> These groups and their members are vitally interested in the First Amendment associational issues presented in this case. California's Unruh Act, as construed and applied by

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<sup>2</sup> Of course, the Congress of the United States has frequently  
(Footnote continued on the following page)

the California courts in this and earlier cases, tests the limits of governmental power to outlaw diversity and pluralism by dictating to the members of these private groups who their associates shall be.

According to one relatively recent compilation, 36 States have enacted statutes proscribing gender discrimination in places of public accommodation. Note, *Roberts v. United States Jaycees: Discriminatory Membership Policy of a National Organization Held Not Protected By First Amendment Freedom of Association*, 34 Cath. U.L. Rev. 1055, 1070 n.104 (1985). Many of these statutes are susceptible as a matter of state law to an expansive construction like that given to the Unruh Act by the court below. See, e.g., *Kiwanis Int'l v. Ridgewood Kiwanis Club*, 627 F. Supp. 1381, 1385-87 (D.N.J. 1986), *appeal pending*, Nos. 85-4306, 85-4483 (3d Cir.); *Lloyd Lions Club of Portland, Oregon v. The Int'l Ass'n of Lions Clubs*, No. A8206-03941, slip op. (Or. Ct. App., Sept. 10, 1986). These States, and the courts of these States, also have an interest in knowing the constitutional limitations on the application of these statutes.

This case also presents a recurring fact pattern, out of which there has been and continues to be litigation. Many private service and other clubs are associated with other clubs at a national or international level. Facts essentially the same as those of this case arise whenever a local club admits a male or female member contrary to the provisions of its charter from the national organization. Litigation then frequently follows when the national organization revokes or threatens to revoke the charter of the lo-

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2 (Continued)

chartered private, single-sex organizations at the national level. See, e.g., 36 U.S.C. § 21, *et seq.* (Boy Scouts of America); 36 U.S.C. § 31, *et seq.* (Girl Scouts of America); 36 U.S.C. § 78, *et seq.* (Ladies of the Grand Army of the Republic); 36 U.S.C. § 91, *et seq.* (American War Mothers).



cal club, with the local club resisting revocation by claiming that it is bound by State law not to use the gender criterion specified by its charter. *See, e.g., Kiwanis Int'l v. Ridgewood Kiwanis Club*, 627 F. Supp. at 1385-86; *Lloyd Lions Club of Portland Oregon v. The Int'l Ass'n of Lions Clubs*, No. A8206-03941, slip op. (Or. Ct. App., Sept. 10, 1986); Note, *Roberts v. United States Jaycees: Discriminatory Membership Policy Of A National Organization Held Not Protected By First Amendment Freedom Of Association*, 34 Cath. U.L. Rev. 1055, 1068 n.100 (1985) (collecting cases). Moreover, after the decision below, suits against local clubs directly may certainly be expected. Thus, the Court can reasonably anticipate that the constitutional issues presented by this case will arise often in the future, and this Court's guidance on these issues is necessary.

## **II. The Decision Below Fundamentally Alters The Standards Announced By This Court For Assessing Rights Of Intimate Association Under The First Amendment.**

Discussing the types of personal affiliations entitled to the protection of freedom of intimate association against state interference, in *Roberts v. United States Jaycees* this Court wrote:

[T]hey are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities – such as a large business enterprise – seems remote from the concerns giving rise to this constitutional protection.

468 U.S. at 620. This Court further stated that “[d]etermining

the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a *careful assessment* of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments", and that the "factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.* (emphasis added).

Any "careful assessment" of those factors in the case at bar demonstrates that the freedom of intimate association protects local Rotary Clubs against the application of the Unruh Act. With regard to the relative size of Rotary Clubs, as noted in the Jurisdictional Statement, there are approximately 19,788 local clubs with a total membership of approximately 907,750. [Jurisdictional Statement, pp. 9-10] Membership in local clubs thus averages 46 men, and those local clubs exclusively select their own members. At the time Rotary International revoked its charter, the Duarte Club's membership was comprised of 21 people.

Given the small size of the local clubs, it is not surprising that the clubs are highly selective in their decisions to accept new members. A person must be invited to join a local Rotary Club as the clubs neither solicit from nor extend membership to the public generally. The number of members a local club can have from any single line of business or profession is also limited. Moreover, an active member must work in a leadership capacity in his business or professional classification and must work or live within the club's territory.

Rotary also has an elaborate procedure for selecting members. A candidate's name must be submitted to the local club by the membership committee or by a member. The candidate's name is submitted to the local club's board of directors, which forwards the name to a classifications committee and membership committee. The classifications committee ensures that the addition of the proposed member will not cause the club to exceed the maximum number of members the club

may have from any single line of business and that the proper classification has been selected. The membership committee evaluates the candidate's character, business and social standing, and general eligibility. If the classification and membership committees support the application, the candidate's name, business, and classification are published to the members. If no member files a written objection with the board of directors within ten days, the candidate becomes a member. If a member makes an objection, the board of directors must approve the candidate's membership with an additional vote. A more selective procedure for new members is difficult to imagine.

Membership in Rotary is also characterized by seclusion from nonmembers in critical aspects of the membership. For example, as noted in the Jurisdictional Statement, Rotary meetings are not open to the public; joint meetings with other service clubs are opposed; and Rotarians are discouraged from joining other service clubs. Finally, membership in a local Rotary Club is not transferable to any other Rotary Club.

Rather than "careful[ly] assess[ing]" the factors specified in *Roberts*, 468 U.S. at 620, in light of the above undisputed facts pertaining to Rotary, the California Court of Appeal simply ignored most of them, and it fundamentally altered the focus of the one factor – size – that it emphasized. With regard to the size criterion, the California court stated that "the immense size of *International* and the number of Rotarians throughout the world is hardly indicative of an intimate relationship." *Rotary Club of Duarte v. Board of Directors of Rotary Int'l*, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213, 230 (1986)(emphasis added). In *Roberts*, however, this Court focused on the fact "that the *local* chapters of the Jaycees are large and basically unselective groups," noting that "the Minneapolis chapter had approximately 430 members, while the St. Paul chapter had about 400." *Roberts v. United States Jaycees*, 468 U.S. at 621 (emphasis added). The local Rotary Clubs are approximately one-tenth the size of the Jaycees'

clubs involved in *Roberts*.

Moreover, it is analytically preposterous and denigrates the interests in intimate association actually involved to focus upon Rotary International – an association of local Rotary Clubs of which no natural person is a member – rather than the local club itself. It is the *local* club that selects the persons who are its members. It is the members of the *local* club who associate with each other on a daily and weekly basis and to whom size, selectivity, personal friendship and congeniality are important. It is these “human relationships” at the local level that pose the limits of governmental authority to intrude, and it is these 40 person groups who are subject to the dictates of the Unruh Act – *and* to suits by persons challenging their membership criteria – under the California court’s construction of that Act. In short, when evaluating the size criterion, the court below focused on the wrong entity.<sup>3</sup>

The California court also rejected Rotary’s claim to freedom of intimate association because “while fellowship and service to the community play a very important part in the Rotary organization, the business benefits and commercial advantages to be gained are also clearly an inducement for the business and professional leaders of the community to join.” 224 Cal. Rptr. at 230. In *Roberts*, however, this Court did

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<sup>3</sup> It is true, of course, that on the facts of this case it was the 21 members of the local Club who decided to admit women members. It is equally true that those 21 persons in Duarte, California are perfectly free to create, join and participate in a local organization with whatever membership criteria they wish. What they are not perfectly free to do, however, is to call any such local group a Rotary Club, to use the Rotary name and trademarks, and to have their organization participate in the international association of Rotary Clubs. It is only because the *local* Club was held subject to the dictates of the Unruh Act that the court below could enjoin Rotary International from enforcing its rights with respect to the Duarte Club’s charter. Every other *local* Rotary Club in California is now legally disabled from enforcing its male membership criterion. *Those* are the intimate

(Footnote continued on the following page)

not identify the motives of particular members as a factor determining whether or not a group is entitled to freedom of intimate association. Surely no one would argue that the State can interfere with a person's choice of whom to marry upon a showing that either of the two spouses was "marrying for money." See *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l*, 83 Misc. 2d 1075, 374 N.Y.S.2d 265, 268 (1975) ("activities or motives of some individual members [do not] . . . convert such organization itself into a commercial enterprise"), *aff'd*, 52 A.D.2d 1075, 383 N.Y.S.2d 383 (1976), *aff'd*, 41 N.Y.2d 1034, 395 N.Y.S.2d 633, *cert. denied*, 434 U.S. 859 (1977).

Finally, the California Court of Appeal nowhere addressed the other two factors identified in *Roberts*: (1) selectivity in beginning the relationship and (2) seclusion from others in critical points in the relationship. Rather, it reasoned that, by requiring Rotarians temporarily absent from the locality to make up missed meetings by attending the meeting of another club, Rotary encourages congeniality on a worldwide level. 224 Cal. Rptr. at 230. This is tantamount to depriving a family of freedom of intimate association because of occasional visits to or from second cousins.

The decision below simply either misapplies or fails to apply the factors set forth by this Court in *Roberts*. In lieu thereof, the California court substituted its judgment on the appropriate analysis of a First Amendment case for that of this Court.

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3 (Continued)

human relationships and the "deeply felt choices of associational preference of many Rotarians," found as a fact by the state trial court and undisturbed by the Court of Appeal, 224 Cal. Rptr. at 228, that are "material[ly] interfer[ed] with" by application of the Unruh Act. *Id.*



### III. The Decision Below Also Departs From This Court's Analysis Of The Expressive Aspects Of First Amendment Associational Freedom.

This Court has had the opportunity on several occasions to reaffirm that charitable and similar activities are entitled to First Amendment protection. For example, in *Roberts*, the Court wrote that "members of the Jaycees regularly engage in a variety of civic, charitable, lobbying, fund-raising and other activities worthy of constitutional protection under the First Amendment . . . ." 468 U.S. at 626-27. *Accord*, e.g., *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. \_\_\_, 87 L.Ed.2d 567, 577 (1985) ("charitable appeals for funds, on the street or door to door, involve a variety of speech interests - communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes - that are within the protection of the First Amendment" - citation omitted). Thus the freedom of expressive association guaranteed to Rotary by the First Amendment "is plainly implicated in this case." *Roberts*, 468 U.S. at 622.

In determining that the Minnesota statute in *Roberts* did not impermissibly abridge the Jaycees' "right to associate for expressive purposes," 468 U.S. at 623, the Court employed a two-prong test. First, the Jaycees had "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." 468 U.S. at 626. The Court determined that there was "no basis in the record for concluding that admission of women as full voting members [would] impede the organization's ability to engage in these protected activities . . . ." *Id.* at 627. Second, with respect to any "incidental abridgment of the Jaycees' protected speech," the "effect" of the statute was "no greater than is necessary to accomplish the State's legitimate purposes." *Id.* at 628.

In the instant case, the California Court of Appeal essentially elides in its constitutional analysis the first prong of

the *Roberts* test for abridgment, and rather addresses only the second, "state interest/least restrictive means," prong. See 224 Cal. Rptr. at 231. Under that approach, of course, the result is a foregone conclusion. See *id.* Cf. *Roberts v. United States Jaycees*, 468 U.S. at 635 (O'Connor, J., concurring) ("an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominately of the type protected by the First Amendment").

So far as the court below addressed (in a non-constitutional portion of its opinion) the first issue posed by this Court's analysis in *Roberts* – i.e., the record with respect to "imped[ing] the organization's ability to engage in . . . protected activities," 468 U.S. at 627 – it noted the trial court's finding, supported by the record:

[T]hat the continued successful worldwide operation of Rotary is materially dependent on a delicate balance of divergent attitudes in diverse cultures, and that judicial interference with this balance, as reflected by the votes in Rotary's Council on Legislation, would risk a material and harmful disruption of the existing cooperative integrity of Rotary International both inside and outside the State of California.

224 Cal. Rptr. at 228. The Court of Appeal then merely rejoined that this "does not support a finding that the admission of women into the local Rotary Club of Duarte would cause the downfall of the District or International or seriously interfere with Rotary's objectives." *Id.* (emphasis added).

It blinks both substance and reality to suggest that the effect upon the First Amendment right of *expressive* association is to be judged by the "admission of women into the local Rotary Club of Duarte . . ." The "imped[iment]" to Rotary's "ability to engage in these protected activities," *Roberts*, 468 U.S. at 627, which as a matter of undisputed fact involve world-wide activities and a "delicate balance of



divergent attitudes in diverse cultures," 224 Cal. Rptr. at 228, must be measured by the real result decreed by that court's opinion – *i.e.*, that *all* local Rotary Clubs in California must admit women (as, indeed, under that court's constitutional analysis, must all clubs in other States having comparable state law requirements). Furthermore, under the California court's analysis, the only way to satisfy the burden is to prove that State imposition of the membership requirement will cause the organization to *collapse*. It seems quite doubtful that this draconian level of proof is what this Court meant by a "demonstrat[ion of] . . . serious burdens on the male members' freedom of expressive association" and a "record [showing] . . . that admission of women . . . will impede the organization's ability to engage in . . . protected activities. . . ." 468 U.S. at 626, 627. Plenary review is warranted to consider and clarify this point alone.

#### **IV. The Unruh Act As Construed By California Courts Is Impermissibly Vague And Overbroad As To Both The Organizations Covered And The Membership Criteria Proscribed As "Arbitrary".**

Starting with a statute which proscribes discrimination on the basis of sex, race, color, religion, ancestry, or national origin in all "business establishments," the California courts have held: (1) not only that local Rotary Clubs are "business establishments" but so too are the Boy Scouts and a local Boys' Club; (2) not only does the Unruh Act proscribe the types of discrimination it enumerates, but also any form of discrimination a court of that State condemns as "arbitrary," including barring a homosexual from a leadership position in the Boy Scouts; and (3) that the First Amendment does not shelter any of these private organizations from such State-imposed intrusions upon their members. *See Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 219 Cal. Rptr. 150, 707 P.2d 212 (1985); *Curran v. Mt. Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983),

*appeal dismissed for want of final judgment*, 468 U.S. 1205 (1984).

In *Roberts*, this Court described the void-for-vagueness doctrine in the following terms:

[A] statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

468 U.S. at 629 (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1925)). This Court had "little trouble concluding that these concerns [were] not seriously implicated by the Minnesota Act," in significant part because the highest court of that State had placed a limiting construction involving "a number of objective and specific criteria" upon the statute's sweep and had further suggested that "the Kiwanis Club might be sufficiently 'private' to be outside the scope of the Act." 468 U.S. at 629-30.

"[W]e read the illustrative reference to the Kiwanis Club, which the record indicates has a formal procedure for choosing members on the basis of specific and selective criteria, as . . . providing a further refinement of the standards used to determine whether an organization is "public" or "private."

468 U.S. at 630.

The California courts have imposed no such limiting construction on the sweep of the Unruh Act, but rather have taken a reasonably definite standard – "business establishment" – and rendered it unknowable until the next court decision. People of common intelligence would not expect the Boy Scouts or the Boys' Club to satisfy the definition of "business establishment." This is equally true for Rotary. The court below found that Rotary is a "business establishment" principally because local Rotary Clubs are linked with each other through a hierarchial structure at the district, national and international level. See 224 Cal. Rptr. at 222-24. Does this mean any local group that has links to other similar groups

in a hierarchial structure is a "business establishment" under the Unruh Act and subject to state regulation of its membership on that basis? – the NAACP?; the Shriners?; the ACLU? Similarly, what person of common intelligence can do more than guess what membership criterion the California courts will next determine to be "arbitrary" discrimination? – are Rotary's and Kiwanis' limitations to business or profession and community leadership next on the agenda?

### CONCLUSION

The interpretation by California courts of the term "business establishment" as employed in the Unruh Act, and their continuing search for the "arbitrary" membership criteria that they deem proscribed by that Act, can fairly be likened to a river which is raging out of control and has already uprooted the Boy Scouts, the Boys' Clubs and Rotary from their entrenchment in the banks of privacy. Further down the bank, but within the river's path, lie Kiwanis and other private service organizations, the Girl Scouts, the Catholic Youth Organization, fraternal, political and cultural organizations, and countless other private, voluntary associations. At some point, the First Amendment erects a dam to that river, and Kiwanis International respectfully submits that dam was breached by the California court's application of the Unruh Act in this case.

The question is not what values – be it gender equality or any other – shall be or should be enshrined in our public life and government. The question is whether the First Amendment erects a shelter in the form of private and voluntary associations for those who dissent from public values, for those who would strike the balance between competing values somewhat differently, and for those who believe that public values are not seriously impaired by private expression of private associational preferences.

As stated by a state court jurist whose commitment to

the public value of gender equality cannot be questioned but who believed in another case that the Unruh Act was being stretched beyond any reasonable bound:

By protecting the freedom to base sexual associations on personal affinities, society promotes its pluralism, with all the values that connotes – values such as a diversity of views, a variety of ideas, and preservation of traditions . . . .

The value of a pluralistic, democratic society is that it permits members of each group to join with others sharing their views, to pool their resources as they wish, to seek the resources of new members, and to experiment to try to prove the validity of their respective concepts.

*Isbister v. Boys' Club of Santa Cruz, Inc.*, 219 Cal. Rptr. at 167 (Mosk, J., dissenting).

For these reasons, Kiwanis International as *amicus curiae* respectfully urges that the Court note probable jurisdiction and set this case for plenary consideration.

Respectfully submitted,

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10  
No. 86-421

Supreme Court, U.S.  
**FILED**

**DEC 18 1986**

JOSEPH E. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

**BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,**

*Appellants,*

v.

**ROTARY CLUB OF DUARTE, et al.,**

*Appellees.*

**Appeal from the Court of Appeal  
of the State of California  
Second Appellate District**

**JOINT APPENDIX**

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**APPEAL DOCKETED SEPTEMBER 16, 1986  
JURISDICTION POSTPONED NOVEMBER 3, 1986**

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The following opinions, decisions, judgments, orders, and parts of the record to which the parties wish to direct the Court's attention have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement:

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Court, Filed March 21, 1983 ..... J.S. App. B-1

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Stipulation Regarding Certain

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of the Record ..... J.S. App. F-1

Deposition of Herbert A. Pigman, General

Secretary of Rotary International ..... J.S. App. G-1

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

- June 20, 1978—Plaintiffs' original complaint for declaratory relief filed in Superior Court of the State of California for the County of Los Angeles. . . . .
- December 8, 1978—Defendants' demurrer to complaint filed . . . . .
- January 8, 1979—Plaintiffs' first amended complaint for injunctive and declaratory relief filed . . . . .
- February 22, 1979—Defendant's demurrer to complaint filed . . . . .
- May 7, 1979—Order entered overruling defendants' demurrer to the complaint . . . . .
- June 12, 1979—Defendant's answer filed . . . . .
- November 29, 1982—Trial briefs . . . . .
- November 29, 1982—Stipulation regarding certain undisputed facts and related portions of the record
- December 2, 1982—Bench trial of action commenced
- December 9, 1982—Defendant's Supplemental trial brief. . . . .
- December 16, 1982—Plaintiffs' Response to Defendant's Supplemental trial brief. . . . .
- February 8, 1983—Minute Order of Superior Court rendering its Intended Decision for defendants . . . .
- February 8, 1983—Memorandum of Decision of Superior Court . . . . .
- March 21, 1983—Judgment of Superior Court entered for defendants . . . . .
- March 21, 1983—Statement of Decision of Superior Court. . . . .
- March 28, 1983—Minute Order of Superior Court declaring plaintiffs' objections to proposed statement of decision untimely and moot. . . . .

March 29, 1983—Notice of entry of judgment filed . .	
April 19, 1983—Plaintiffs' notice of appeal filed . . . . .	
March 17, 1986—Opinion and judgment of the Court of Appeal of the State of California . . . . .	
April 9, 1986—Order of Court of Appeal Modifying Opinion and Denying Rehearing . . . . .	
June 18, 1986—Order of California Supreme Court Denying Petition for Review . . . . .	
July 14, 1986—Notice of Appeal to United States Supreme Court filed . . . . .	
September 16, 1986—Appeal docketed . . . . .	
November 3, 1986—Order of United States Supreme Court postponing consideration of jurisdiction to the hearing on the merits . . . . .	

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omitted in  
printing)

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

ROTARY CLUB OF DUARTE,  
MARY LOU ELLIOTT, AND  
ROSEMARY FREITAG,

*Plaintiffs,*

vs.

BOARD OF DIRECTORS OF  
ROTARY INTERNATIONAL,  
ROTARY DISTRICT 530, PAUL  
G. BRYAN, OLIVER BATCH-  
ELLER and DOES I through XX,

*Defendants.*

No. C 244 753

AMENDED  
COMPLAINT FOR  
INJUNCTIVE AND  
DECLARATORY  
RELIEF

(Civil Code Section 51)  
(California Constitution  
Article I, Section 8)  
(C.C.P. Section 526)

Plaintiff alleges:

(transcript numbers omitted in printing)

## FIRST CAUSE OF ACTION

1. That plaintiff Rotary Club of Duarte has been a member of defendant Rotary International since 1952, approved and organized as a service club under the Articles and By-Laws of Rotary International and, as a non-profit association under the laws of the State of California.
2. That Donna Bogart was a female member of the Rotary Club of Duarte and is a resident of the City of Duarte, County of Los Angeles.
3. That plaintiff Mary Lou Elliott is a female member of the Rotary Club of Duarte and resident of the City of Glendora, County of Los Angeles.
4. The plaintiff Rosemary Freitag is a female member of the Rotary Club of Duarte and resident of the City of Pasadena, County of Los Angeles.
5. That defendant Board of Directors of Rotary International (henceforth referred to as "Board") is the administrative body of Rotary International, an association with over 800,000 members in 152 countries, formed under Illinois State law and with its headquarters located in the City of Evanston, State of Illinois.
6. That defendant Rotary District 530 is a local association of Rotary Clubs, encompassing within its jurisdiction the Rotary Club of Duarte with its office located in the City of Pasadena, County of Los Angeles.
7. That defendant Paul G. Bryan was District Governor of Rotary District 530 for the 1977-78 fiscal year and is a resident of the City of Pasadena, County of Los Angeles.

8. That defendant Oliver Batcheller is District Governor of Rotary District 530 for the 1978-79 fiscal year and a resident of the City of Claremont, County of Los Angeles.

9. That plaintiffs do not know the true names of defendants sued herein as Doe I through Doe XX.

10. That on or about March 3, 1977, plaintiff Rotary Club of Duarte wrote a letter to the then District 530 Governor Paul Lippold requesting a change in the Duarte by-laws to permit membership of women in the Rotary Club of Duarte.

11. That no answer to this request was received.

12. That in March, 1977, Donna Bogart was invited to join plaintiff Rotary Club of Duarte and did become a member of said club.

13. That on or about July 28, 1977, defendant District Governor Paul G. Bryan attended a meeting of plaintiff Rotary Club of Duarte, was introduced to Bogart as a member and chairperson of the Education Committee.

14. That the dues for Donna Bogart were received by defendant Board of Governors of Rotary International for the period July 1 through December 31, 1977.

15. That the aforementioned dues were accepted in the name of "Donna Bogart" and Bogart received her subscription to the Rotarian Magazine in the name of Donna Bogart.

16. That at the aforementioned July meeting defendant Bryan suggested that dues for Donna Bogart should be submitted in the name of "D. Bogart" or "Don Bogart."

17. That subsequent to the meeting of July 28, defendant Bryan met with other Rotary clubs in Rotary District 530, acknowledged that the Rotary Club of Duarte had a



female member, and stated that he thought her membership had been submitted under the name of D. or Don Bogart.

18. That plaintiffs Rosemary Freitag and Mary Lou Elliott were admitted to membership on or about October 26, 1977.

19. That on or about December 17, 1977, defendant Paul Bryan telephoned Bill Brooks, Secretary-Treasurer for plaintiff Rotary Club of Duarte, and informed him that plaintiff Rotary Club of Duarte must drop its women members or its charter would be revoked.

20. That on or about January 10, 1978, defendant Bryan wrote to Dr. Richard C. Key, president of plaintiff Rotary Club of Duarte, and directed a request be made and accepted for the resignation of Bogart and plaintiffs Elliott and Freitag.

21. That on or about January 19, 1978, a telegram from Harry A. Stewart, General Secretary of Rotary International, was received by Dr. Key requesting confirmation of the membership of women in the Rotary Club of Duarte.

22. That on or about January 20, 1978, Dr. Key wrote Mr. Stewart to inform him that the membership of plaintiff Rotary Club of Duarte had unanimously voted to refuse to terminate women members and to refuse to ask women members to voluntarily resign from the Club.

23. That on or about January 23, 1978, Mr. Stewart wrote Dr. Key and Mr. Brooks to indicate that a hearing would be conducted on February 23, 1978, by defendant Board of Directors to consider disciplinary action to suspend or expel plaintiff Club.

24. That on or about February 23, 1978, the aforementioned hearing was held by defendant Board.



25. That on or about February 23, 1978, plaintiff Rotary Club of Duarte was informed by telegram that its charter would be revoked no later than March 27, 1978, if said Club did not expel its women members.

26. That on or about March 21, 1978, Dr. Key wrote to Jack Davis, President of Rotary International, filing an appeal to the Rotary Convention to be held in Tokyo, Japan in May, 1978, and requesting a delay in the expulsion of plaintiff Rotary Club of Duarte until after the convention.

27. That on or about March 28, 1978, Mr. Stewart wrote Dr. Key to inform him that plaintiff Rotary Club of Duarte had been terminated on March 27, 1978, that plaintiff Rotary Club of Duarte was no longer entitled to use the name, emblem, or other insignia of Rotary International, and that plaintiff Rotary Club of Duarte must return its charter.

28. That at its annual international convention in Tokyo, Japan on or about May 16, 1978, Rotary International denied the appeal of the Rotary Club of Duarte for reinstatement in Rotary International.

29. That plaintiffs have exhausted all available administrative remedies.

30. That the object of Rotary International as indicated in its Constitution, Article III, is:

"The object of Rotary is to encourage and foster the ideal of service as a basis of worthy enterprise and, in particular, to encourage and foster:

First. The development of acquaintance as an opportunity for service;

Second: High ethical standards in business and professions; the recognition of the worthiness of all useful

occupations; and the dignifying by each Rotarian of his occupation as an opportunity to serve society;

Third. The application of the ideal of service by every Rotarian to his personal, business and community life;

Fourth: The advancement of international understanding, good will, and peace through a world of fellowship of business and professional men united in the idea of service."

31. That the Constitution of Rotary International Article IV, Section 3, provides in part:

"(a) A Rotary Club shall be composed of men with the qualifications hereinafter provided and no club shall be qualified for membership in Rotary International unless the qualifications of its active members are as follows:

They are adult male persons of good character and good business or professional reputation; and . . ."

32. That Rotary International is a business establishment within the meaning of the use of that term in the Unruh Civil Rights Act (Civil Code Section 51 et seq.).

33. That defendants Board of Governors of Rotary International, Rotary District 530, Paul G. Bryan, Oliver Batcheller and Does I through XX are in violation of the Unruh Civil Rights Act.

## SECOND CAUSE OF ACTION

34. That plaintiffs re-allege paragraphs 1 through 29 of their First Cause of Action and incorporate the same by reference as though fully set forth herein.

35. That Bogart and plaintiffs Elliott and Freitag are being impeded in pursuing their businesses, professions, vocations or employment by the refusal of defendants to allow them to belong to the Rotary Club of Duarte in violation of Article I, Section 8 of the Constitution of the State of California which reads:

"A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

### THIRD CAUSE OF ACTION

36. That plaintiffs re-allege paragraphs 1 through 29 of their First Cause of Action and incorporate the same by reference as though fully set forth herein.

37. That Rotary International knowingly condoned the membership in Rotary of Donna Bogart for the period July 1 through December 28, 1977.

38. That defendant Paul G. Bryan and Does I through XX knowingly condoned the membership in Rotary of Donna Bogart for the period of not less than July 28 to December 28, 1977.

39. That Paul Lippold, immediate past District Governor of defendant District 530 knowingly condoned the membership in Rotary of Donna Bogart for the period he was in office.

40. That the conduct of defendants Board of Directors and Does I through XX and Paul G. Bryan induced plaintiffs to accept women members in the Rotary Club of Duarte and to apply for and be accepted as members of said Rotary Club of Duarte.

41. That defendants seek to deny the right of plaintiff Rotary Club of Duarte to comply in its policies with the Constitution and laws of California.

42. That plaintiffs have no adequate remedy at law, or otherwise, for the harm and damage threatened to be done by defendants, as evidenced by the allegations as set forth in the paragraphs above.

43. That irreparable harm, damage and injury will follow and be done to plaintiffs unless the acts and conduct of defendants above complained of are declared void as prayed for below.

WHEREFORE, plaintiffs pray

1. That defendants be preliminarily and permanently enjoined from declaring the charter issued to the Rotary Club of Duarte to be null and void, from compelling the delivery of the charter to any representative of Rotary International, from prohibiting the Rotary Club of Duarte of any of its members from using the name, emblem, and/or other insignia of Rotary International, and from enforcing any provision of the articles and/or by-laws of Rotary International that might limit membership in the Rotary Club of Duarte to males.

2. That plaintiff Rotary Club of Duarte be reinstated to its place as a member of Rotary International and Rotary District 530.

3. That defendants allow plaintiff Rotary Club of Duarte full participation in the District 530 conference and all other district activities.

4. That the court declare that the acts of defendants, in so far as they seek to compel plaintiff Rotary Club of Duarte to expel its women members and to deny plaintiffs Elliott

and Freitag their right to belong to the Rotary Club of Duarte and Rotary International.

5. That plaintiffs be awarded costs herein.

6. That plaintiffs be awarded such other and further relief as the court may deem proper.

Dated:

By SANFORD K. SMITH  
Sanford K. Smith

By CAROL AGATE  
Carol Agate  
*Attorneys for Plaintiffs*

(Certificate of service omitted in printing)

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Attorneys for Defendants Board of Directors of Rotary International, Rotary District 530, Paul G. Bryan and Oliver Batcheller

(File stamp  
 omitted in  
 printing)

SUPERIOR COURT OF THE STATE  
 OF CALIFORNIA  
 FOR THE COUNTY OF LOS ANGELES

ROTARY CLUB OF DUARTE,  
 MARY LOU ELLIOTT, AND  
 ROSEMARY FREITAG,

*Plaintiffs,*

v.

BOARD OF DIRECTORS OF  
 ROTARY INTERNATIONAL,  
 ROTARY DISTRICT 530, PAUL G.  
 BRYAN, OLIVER BATCHELLER  
 and DOES I through XX,

*Defendants.*

No. C 244,753

ANSWER TO  
 COMPLAINT

Defendants Board of Directors of Rotary International, Rotary District 530, Paul G. Bryan and Oliver Batcheller ["Defendants"], for themselves alone, answer plaintiffs' "Amended Complaint for Injunctive and Declaratory Relief" ["Complaint"] as follows:

*First Cause of Action.*

1. Allege they have no information or belief on the subject sufficient to enable them to answer the allegations of Paragraphs 2, 3, 4, 9, 10, 11, 12 and 18 of the Complaint, and based upon such lack of information or belief, denies generally and specifically each and every allegation of said Paragraphs.

2. Admit the allegations of Paragraph 1 of the Complaint, except defendants deny that plaintiff Rotary Club of Duarte has been a member of Rotary International after March 27, 1978.

3. Admit the allegations of Paragraphs 5, 7, 8, 14, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30 and 31 of the Complaint.

4. Admit the allegations of Paragraph 13 of the Complaint, except defendants deny that Paul G. Bryan was introduced to Donna Bogart as a member of plaintiff Rotary Club of Duarte.

5. Deny generally and specifically each and every allegation of Paragraphs 6, 15, 16, 17, 19, 29, 32 and 33 of the Complaint.

*Second Cause of Action.*

6. Defendants reallege and incorporate by reference herein Paragraphs 1 through 5 of this Answer to this Complaint as if set forth fully here, in answering Paragraph 34 of the Complaint.

7. Deny generally and specifically each and every allegation of Paragraph 35 of the Complaint.



*Third Cause of Action.*

8. Defendants reallege and incorporate by reference herein Paragraphs 1 through 5 of this Answer to Complaint as if set forth fully here, in answering Paragraph 36 of the Complaint.

9. Deny generally and specifically each and every allegation of Paragraphs 37, 38, 39, 40, 41, 42 and 43 of the Complaint.

### **AFFIRMATIVE DEFENSES**

10. As a First affirmative defense to the Complaint, defendants allege that the First, Second and Third Causes of Action fail to state facts sufficient to constitute a cause of action against these defendants.

11. As a Second affirmative defense to the Complaint, these defendants allege that the First, Second and Third Causes of Action are barred by laches and estoppel.

12. As a Third affirmative defense to the Complaint, these defendants allege that the First Cause of Action cannot constitute a claim against these defendants because neither Rotary International nor any of its affiliated Rotary Clubs are business establishments generally open to the public and engaged in the sale of goods or services.

13. As a Fourth affirmative defense to the Complaint, these defendants allege that the Second and Third Causes of Action are a restraint upon the law making power of the state, and not against private organizations.

14. As a Fifth affirmative defense to the Complaint, these defendants allege that the First, Second and Third Causes of Action are barred because there is no significant

involvement by the state in the activities of Rotary International or its affiliated Rotary Clubs.

15. As a Sixth affirmative defense to the Complaint, these defendants allege that the Third Cause of Action fails to state facts sufficient to constitute a Cause of Action because an injunction will not lie for past conduct.

WHEREFORE, these Defendants pray for judgment as follows:

1. That plaintiffs take nothing by their Amended Complaint;
2. For defendants costs of suit incurred herein; and
3. For such other and further relief as the Court may deem just and proper.

DATED: June 8, 1979.

DARLING, HALL, RAE & GUTE

By PAUL L. GIANNINI

Paul L. Giannini

Attorneys for Defendants

Board of Directors of

Rotary International,

Rotary District 530,

Paul G. Bryan and Oliver Batcheller

(Certificate of Service omitted in printing)

## Exhibit 9

(Logos and Exhibit Stamp omitted in printing)

**Rotary International No. 540****Business relations conferences**

One of the most satisfying vocational service programs for the Rotarian is the business relations conference. The Rotarian learns management techniques that help improve his own business or professional skills. He receives the inspiration of discussing business problems with experts in his own or related fields. And he enjoys the fellowship of sharing ideas with fellow Rotarians.

But equally important is the fact that a business relations conference serves to spread the ideal of Rotary to the general business community in a number of ways. First, by participation of non-Rotarian businessmen in panels and seminars and, second, through the possibility of receiving publicity in the general news or business sections of newspapers and on the broadcast media.

A business relations conference may be known by many names, such as "business clinic" and "vocational seminar." It can cover many topics from labor relations to management methods. A conference can cover a broad spectrum of subjects or it can be built about one theme.

However, though this may be a flexible program, its success depends greatly on the care with which the program is planned, whether it is undertaken by a single club, several clubs jointly, or by an entire district.

**Business relations conferences around the world**

*Vocational Service Seminar* is the new name of the oldest business relations conference in Rotary, drawing delegates from all the clubs in districts 642 and 644 (Illinois, U.S.A)

*Vocational Service Rallies* were hosted by several clubs in district 105. At Manchester, England, the rally was addressed by the Minister of Labour and the chairman of the British Institute of Management.

*The Business Relations Conference* of districts 317 and 320 (India) has three sessions over two days on "the social context of business." Experts in commerce, industry and government discussed with great frankness the need for a reappraisal of the ethical standards of the business community.

*The Business Clinic* of district 528 (California, U.S.A.) broke all records at its ninth annual meeting. More than 1,000 Rotarians attending heard leaders in various fields forecast business conditions.

*Relations of Business to Government* was the theme of a vocational service seminar sponsored by districts 589 and 591. These two districts have alternated sponsorship of these conferences.

*A Vocational Service District Assembly* held at Toronto, Canada, invited all the vocational service committee chairmen of district 707 for a sharing of experiences in club activities.

*Business Relations Conference* of district 762 (Maryland, U.S.A.) featured a post-conference brochure with a complete transcript of its proceedings.

*A Business Relations Conference* for local businessmen was organized by the Rotary Club of Ipoh, Malaysia, to study the ethical aspects of their trade relations.

*Business and Professional Man's Clinic* of district 526 (California, U.S.A.) spread over two days stressed the problems of small business.

*An Intercity Forum on the Philosophy of Management* at Freemantle, Australia, drew a large audience of non-Rotarians and resulted in many improvements in business and professional practices.

### **Organizing the conference**

*Conference Committee.* A special committee to arrange all the details is necessary if the conference is to be a success. Such a committee normally is charged with finding a suitable meeting place, arranging for participants, making sure that feeding and sleeping facilities (where required) are adequate. In those cases where a district is sponsoring the conference, the committee must also find a club to be host to the conference.

The committee stage-manages the conference and is responsible for the report of the conference proceedings which is sent to all participants.

*Host Club.* The host club makes on-the-spot arrangements through reception, registration and publicity committees. The entire membership is enlisted to provide a warm welcome to Rotarians from other clubs both before and during the conference.

### **Program**

The program is the key to success. The conference committee must plan it carefully with definite philosophy in mind. A theme must be chosen for its appeal and importance to businessmen. Then the committee must decide what subjects come under this theme and the right experts must be found.

A good program will allow experts and participants to confront each other directly in discussion and debate, which may be leavened with entertainment and fellowship.

## **Developing the program**

*Theme.* Choose a conference theme that is important and timely and which would offer a challenge to participants. Themes should be comprehensive but not so generalized as to be of interest to no one in particular.

Finding timely themes should not be too difficult. The members of the committee can consider those topics which are of current interest to them as businessmen and they can go through the business pages of newspapers and examine the latest business and trade publications for dominant subject matters.

Most importantly, some way to relate the theme of the conference to the ideal of Rotary should be found. Business ethics, employer-employee relations, competitor relations—all aspects of vocational service—will be found to be germane.

*Participants.* While the experts may not be Rotarians, they should be well-enough known to create interest in the conference. In choosing a topflight executive to participate in your conference, remember that a further advantage is that this may help introduce a desirable non-Rotarian to Rotary.

Short talks by experts can be followed by panels at which Rotarians can quiz the experts. Be sure to arrange for participants at the conference to have plenty of opportunity to mingle with the experts informally so that there can be a meaningful exchange of ideas and information.

*Buzz Session.* Another technique that will help to get the most participation into the conference is the buzz session. This simple but effective method involves dividing the audience up into small groups of perhaps eight to ten and having these groups confer after a talk. For 15 or 20 minutes



they can discuss the talk and formulate questions or observations. One of their number will be designated to report the group's consensus or ask its questions of the speaker. Outstanding points may be recorded on a blackboard as the reports proceed.

*Punchless Playlet.* A playlet or a punchless playlet can be included in the program as a challenge to participants. This form of entertainment helps vary the format of talks and discussions. R.I. offers four playlets in "Vitalizing Vocational Service" (No. 520), which would fit in with this kind of program. It is also possible that someone within the club or district could write something suitable. Punchless playlets are particularly suitable for stimulating independent thinking and precipitating discussion.

*Brainstorming.* A good way to warm up an audience is to have a panel "brainstorm" a problem for solutions and follow this with a buzz session by the audience. Brainstorming is a process whereby a group gets together to put forth any and all solutions that enter their minds no matter how silly or impractical they sound. These ideas are recorded in writing and later are culled for the best ideas. The key to brainstorming is that the process must be uninhibited.

*Debating.* A debate can also add to the interest of the conference. Some controversial topic like labor relations—with representatives of labor and management confronting each other—offers great appeal in this kind of conference.

*Luncheon Address.* A luncheon address offers another opportunity to add value to a conference. The possibilities are many. One would be a "big name" speaker. Another possibility would be some distinguished Rotarian. However, it is not always best to think in terms of big names. An extempo-



aneous talk by some participant on "How we can use what we have learned" can be most effective.

### **Arrangements**

It is important that you get the best physical setting available for your conference, and that you promote vigorously and make sure it is soundly financed. And, remember, to follow through afterward on all aspects.

*Physical Setup.* If the conference is held in a large district or by several districts jointly, the place chosen should be as central as possible for the convenience of all concerned. This consideration will limit the committee in its search for a host club.

Facilities should be adequate for meetings and for lodging participants. A good hotel or motel, a country club or a resort are ideal.

*Duration.* Length of time of the conference is important and should be determined by the distance participants have to travel. A one-day conference is cheaper since lodging does not have to be included; but a conference beginning in the afternoon and concluding at lunch the next day would be better if many participants have to travel any great distance.

*Finances.* Sound financing means that a budget should be carefully prepared and a registration fee should be collected from every participant. The budget for the conference should include promotional expense, rental of meeting place and production of a mimeographed "Highlights" of the conference. Registration fee can cover meals and lodging or administration fees.

The host club can be responsible for collecting registration fees. However, one long-standing business relations conference has established the rule that every club in the two

districts involved obligate itself to at least two registrations. Thus the conference can count on broad participation, since the fee covering all meals and lodging is small. The clubs are encouraged to send participants in addition to the pre-paid registrations.

*Promotion.* There is no point in having a business relations conference if no one shows up for it. One way to ensure good attendance is to promote the conference enthusiastically and vigorously throughout the district or districts involved.

The best promotion is the person-to-person kind. The wholehearted cooperation of the host club is essential. Each member of that club should be persuaded to take his hosting responsibilities personally.

The conference committee should meet with the host club to explain these responsibilities fully. It should leave this meeting assured that these responsibilities will be discharged. The host club should form two committees, one to receive and register participants and the other to promote the conference.

The host club can assign each member one or more clubs in the conference area as his personal responsibility. The chairman of the vocational service committee in each club can be his contact. Personal letters and visits from members of the host club can add weight to the publicity materials provided.

*Publicity.* Publicity materials can include a printed program, a small poster to display in meeting places, and a letter or invitation signed by the district governors, the president of the host club and the chairman of the conference committee.

Emphasize the personalities of the invited experts, their topics and the overall theme of the conference in the promotion. Feature pictures and biographies of the experts in order to persuade business and professional men to attend the conference.

*Follow Through.* It is important to encourage the participants to share what they learn at the conference with their clubs. In a sense, this is the idea of the conference, to carry the vocational service idea to as many Rotarians as possible.

These participants can share their experience through club programs and fireside meetings, and the conference committee can help them in this job by providing the mimeographed "highlights" of the conference as soon as possible—the more detailed, the better. In some cases, a full transcript of the talks has been provided.

The "highlights" not only spread the influence of the conference, but provide a solid basis for promoting future business relations conferences since those who did not attend may be convinced they really missed something.

**Rotary International  
1600 Ridge Avenue  
Evanston, Illinois, U.S.A. 60201**

**Exhibit 10****Rotary International  
No. 501****What Can We do In Vocational Service?**

A Rotary club without a working Vocational Service program is not living up to the spirit of its charter. Rotary is based on the classification principle and Vocational Service is the one avenue of service that is related directly to this principle. Rotary derives its name from the historic fact that the first Rotary club in Chicago rotated its meeting site to a different member's place of business each week, thus underscoring the vocational foundation of its philosophy. It was only as membership grew and this practice became unwieldy that the luncheon meeting was initiated.

A Vocational Service program should create understanding within and between the various occupations in the community and insure improved ethical and practical relations among them.

Vocational Service is a personal obligation incurred by every Rotarian. In filling a classification, he becomes *the* representative of his vocation in that community. The Rotary club must emphasize this obligation, not only when the new member enters the club but also at regular intervals thereafter. The club also has a duty—and a right—to ask each member if he is discharging his vocational obligation.

This personal obligation means that each Rotarian communicates to his colleagues, customers, competitors, and suppliers the ideals of Rotary and in turn he imparts to his fellow club members the ideals of his vocation.

*Vocational Service Week:* Each year, the week that includes 15 October is designated as Vocational Service Week. It has been so designated by the board of directors of R.I. "to emphasize the involvement of each Rotarian, and not just clubs, in the everyday practice of the ideals of Vocational Service." Many of the projects suggested in the following pages can be adapted for use as a Vocational Service Week program in your club. For example, the meeting could be held at a member's place of business that one week, with a Vocational Service award made as part of the occasion. Or, a courtesy contest or career information program could be launched or culminated during that week. These events offer an excellent opportunity to invite the media and officers of community government to attend.

Some Rotary clubs offer excuses for not having a Vocational Service program. A number of clubs say the concept is too vague. Others say it touches on delicate areas, more properly the province of religion, law, psychology, or ethics. Vocational Service, however, is in no way meant to be a substitute for any of these disciplines. It is simply a way of applying the concept of Rotary's ideal of service to business and the professions. There are many programs in Vocational Service that clubs have developed over the years and that you can adopt for your own club's benefit. Simply follow the steps outlined below.

### **First step: understanding the meaning**

Only when you understand the meaning of Vocational Service can you fully realize the opportunities available to you. So, the first step is to launch a program that will create this understanding in your members. Each program suggested below can help do this. In addition, understanding can be gained by reading the basic text in Vocational Service—"Service Is My Business" (No. 50). This book, a

Rotary best seller for decades, is the most complete discussion of Vocational Service in print.

"Service Is My Business" cites actual problems and solutions arising in various business and professional situations. One can match these problems with those that are encountered in one's daily business. The similarity or contrast often is very illuminating.

### **Second step: stimulate personal application**

Understanding the meaning of Vocational Service provides the basis for taking the next step: applying its principles to personal actions. Avoid a direct approach, which may seem intrusive and embarrassing to many members, by having a series of programs throughout the year to remind all members of Vocational Service and their obligation to apply its tenets. Here is a brief listing of program ideas:

**Case studies:** By using cases studies, actual business problems can be stated in a dramatic form that provokes discussion and encourages a free airing of opinion. There is no "right" answer. Participants draw on their own background to offer solutions to business problems or dilemmas, such as ethical behavior, employee relations, or problems arising with competitors. Helpful in setting up a program of case studies for your club is "Let's Get Down To Cases" (No. 57). This is a blueprint on how to develop such a program. It offers sample cases for study and tells how to develop your own cases from actual business problems submitted by your members.

**Survey and report:** Invite club members to tell, anonymously if they prefer, how they are "putting Rotary to work where they work." Give them printed questionnaires as they enter the meeting place. They can fill them out immediately and you can collect them at the end of the meal. Report the



results at the close of the meeting or in the club bulletin. Questions for such a program are provided in "Let's Get Down To Cases."

**Rotation days:** The early practice of rotating meeting sites from one place of business to another is evoked in the program referred to as Rotation Days. This involves holding an occasional weekly meeting at the workplace of a member or, if the workplace cannot handle a large club, perhaps an informal discussion meeting or a visit by a selected few members. In Roodepoort, South Africa, regular meetings were held in the workplaces of members to see how they were practicing the ideal of service. The Rotary Club of Bedford, Ohio, U.S.A., assigned six Rotarians to spend one half day with each of the other members at their places of business and report on how they were putting Rotary to work. The Rotary Club of Borås, Sweden, held evening meetings in the establishments of members so that all could become acquainted with each other's work. Some Rotary clubs in Switzerland ask members to give brief inspirational talks on the meaning of service to the employees of the plants they visit.

**Guests at Rotary meetings:** Employees, competitors, customers, and salesmen are invited by members casually or on special "days" to the Rotary club meetings. Guests can be presented copies of "Service Is My Business." When the entire membership of the Rotary Club of Toronto, Ontario, Canada, was invited to attend 17 meetings of the Vocational Service committee during the year, many brought key employees with them.

**Influencing employees, competitors, customers:** As leaders in the community and in their vocations, Rotarians are in an excellent position to spread the ideal of Rotary. The Rotary Club of London, England, found in a survey of



its members that collectively they employed more than one-quarter million people, an impressive potential for Rotary influence. How wide this influence can be is demonstrated by the experience of a member of the Rotary Club of Malmö-Slottsstaden, Sweden, who was a director of a nationwide watchmen service. He perceived that his employees needed to be helped to "raised their pride in their work, their regard for its honor, and their interest in the body they belong to." Instead of establishing rules for this purpose, he developed a process by which the watchmen discussed the problems of their occupation and worked out their own rules.

A team of three specialists on the ethics of work and employees morale—a high school principal, a clergyman, and an author—guided the process. Their first step was to send a discussion questionnaire to officials and employees of the company in which the problems were stated and analyzed. The fact that they were outsiders with only a superficial knowledge of watchmen and their work helped to convince the employees that rule-making was their own concern.

Three preliminary conferences led by members of the working team were held at different places in Sweden. The result of these conferences was a rough draft of rules of conduct for watchmen. A nationwide meeting involving 60 elected representatives of the watchmen followed. This meeting developed a 20-point code that was adopted by the watchmen.

This example of what one Rotarian was able to do could be a source of inspiration for others. The problem need not necessarily be one of a code of conduct, nor need it be on as wide a scale as it was in Sweden, but each Rotarian

may find some aspect of Rotary—for example, The 4-Way Test—which he feels might be of help to his employees.

### **Third step: Vocational Service project**

It is not enough to start the Rotarian on a personal program of service through his vocation. You also should plan club Vocational Service projects. Though no club project can substitute for individual understanding and application, a worthwhile community project can serve to remind members of their Vocational Service obligation and, at the same time, expose non-Rotarians to this fine ideal.

**Vocational Service award:** Rotary clubs give Vocational Service awards to individuals who exemplify the ideal of service in their work. This award does not have to be confined to Rotarians. And, in fact, excellent public relations can be developed by giving the award to someone in the community who is not a club member.

The Rotary Club of Kimberley, C.P., South Africa, gives an award to a citizen who has contributed to the life and development of the city through his or her vocation.

The Rotary Club of Melbourne, Vic., Australia, gives an award annually to a Rotarian or non-Rotarian who is considered to have given a lifetime of service to the community through his or her vocation.

**The 4-Way Test:** The 4-Way Test provides the opportunity for many interesting programs. A sound approach and a listing of sources of materials for a program in this area is found in "Applying The 4-Way Test" (No. 502).

The Rotary Club of Berri, S.A.S., Australia, sponsored an essay contest on "How can I use The 4-Way Test in my life?" and "Is The 4-Way Test realistic in Australia?"

The Rotary Club of Bukavu, Sud-Kivus, Zaïre Republic, distributed The 4-Way Test in the community and members gave speeches on Vocational Service before 200 students.

**Career information:** Rotarians of the Rotary Club of Rio de Janeiro-Tijuca, Brazil, shared their business and professional experiences with youth through career conferences. Career conferences are a popular program with Rotary clubs. Examples of such programs and a plan for creating a program of your own can be found in "Career Information for Youth" (No. 554).

**A comparison of codes:** Some of the great achievements in Vocational Service have been the adoption of codes of correct practices by trade associations. A club can stimulate such efforts by asking members to submit the codes of their trade associations for comparison and criticism.

**A courtesy contest:** Thoughtfulness, helpfulness, and courtesy by salespeople and others who serve the public are rewarded by the Rotary Club of Standerton, South Africa. Publicity is the keynote of such a project.

**Business expertise for small-business men:** Some Rotary clubs, realizing that there are small-business men or would-be businessmen within their communities who are unable to succeed because of a lack of business expertise, have initiated programs to help them.

The Rotary Club of Tarzana, California, U.S.A., helped a man who was a member of a minority group start a shoe and saddlery repair business. Club members helped him by offering advice in their own fields of competence, such as banking (securing a loan), real estate (choosing a good business site), law (incorporating the business), etc.

The Rotary Club of Mufulira, Zambia, offered a course of three lectures on salesmanship, record keeping and relations with employees to local shopkeepers.

The Rotary Club of Davao, Philippines, with the cooperation of the University of Mindanao, has held several six-week small-business clinics offering training in scientific business management.

**Discussion programs:** Good subjects for discussion are employer-employee and buyer-seller relations. Similarly, other aspects of Vocational Service pose ethical problems that may interest your members. Bear in mind that when presenting controversial subjects before Rotary clubs both sides should be represented. Management and labor people, salesmen and purchasing agents, manufacturers, and dealers are some of the interests that may be teamed for debate. If strong views are expressed for only one side of the issue there should be opportunity for members to raise questions.

The Rotary Club of Chembur (Bombay), Mahar., India, sponsored a four-hour discussion of wage policies, capitalism, employee's rights and obligations, socialism, and laws affecting employers and employees.

The Rotary Club of Deland, Florida, U.S.A., was the scene of Rotary deliberation on the slogan: "The customer is always right."

Members of the Rotary Club of Dacca, Bangladesh, gave a series of talks on the theme: "Temptations in my business."

Members of the Rotary Club of Bathurst, N.S.W., Australia, debated the question of profit sharing as an answer to industrial unrest. They based their contentions on actual experience.

In Ipohk Perak, Malaysia, a physician, a patient, and an onlooker presented their views on medical practice to the club.

**The play's the thing:** Dramatizations of Vocational Service themes cast your club members in brief roles that launch a discussion of business problems.

### **Questions for a survey**

It is easy to find out if your members are fulfilling their Vocational Service obligation. Ask them. One way to ask is to conduct a survey. To encourage frankness, permit anonymous replies. Following are the kinds of questions you might ask:

- What have you done to increase your service to society?
- Do you apply the ideal of "Service Above Self" when setting prices or fees?
- Are you honest in tax reports? Insurance claims? Expense accounts?
- How do you deal with complaints of deception by suppliers and customers?
- Do you encourage honesty in advertising? If so, how?
- Do you promote employees on the basis of merit and seniority or do you do so on the basis of irrelevant factors?
- Have you stimulated creativity and loyalty among your employees?
- What do you plan for the welfare of your employees?
- Are you making the influence of Rotary felt in your trade or profession? How?

- Have you acquainted the people who work with you with The 4-Way Test and "Service Is My Business"?

**[Reporter's Transcript of Proceedings at 69-70]**

Mr. Smith: As was suggested yesterday, we have worked out the stipulation regarding the testimony of Dr. Jacob Frankel which stipulation has been signed by counsel representing both parties in the case.

The Court: All right, fine.

Mr. Kennedy: This, just for the record, it is my understanding, the purpose of this stipulation as it will appear, is that if Dr. Frankel were called, he would testify to certain facts.

The Court: Yes.

Mr. Kennedy: In entering into this stipulation, the defendants do not, of course, concede the truth of those facts of that testimony.

Moreover, counsel for the plaintiffs understand that it is Rotary's contention that these facts are irrelevant and will—the admission, as it were, of this evidence is subject to such motion to strike.

The Court: All right.

Mr. Kennedy: And, finally, that one of the understandings of the defendants in entering into this stipulation is that the plaintiffs' case in chief is now closed.

The Court: Fine.

Mr. Kennedy: Is that agreeable?

Mr. Smith: That's agreeable with us.

Mr. Kennedy: Then I will give this to the clerk, if I may your Honor.

The Court: Fine.



Mr. Kennedy: And I will move to strike on the grounds of irrelevancy.

The Court: All right. Let me see it. I will deny the motion to strike. We will receive it in evidence as our next exhibit in order.

The Clerk: Your Honor, I've filed it already. It will just go into the file.

The Court: All right.

**STIPULATION RE TESTIMONY OF  
DR. JACOB FRANKEL**

The parties stipulate that if he were called as a witness, Dr. Frankel would testify as follows:

He is president of California State College, Bakersfield and is a member of the Rotary Club of Bakersfield.

He considers Rotary membership to be essential in order for a college president to raise funds. All of the members of his cabinet are members of various Rotary Clubs and were encouraged to join Rotary as a part of their job. There are no women in the cabinet.

He used to be the treasurer of the Bakersfield Club and noted that only 8 or 10 out of the club's 200 members use personal checks to pay their dues. All of the other members' dues are paid by their companies or businesses.

Rotary District 530 does not include Bakersfield.

JOHN KENNEDY

John Kennedy for  
Defendants

SANFORD SMITH

Sanford Smith for  
Plaintiffs

(File stamp omitted in printing)

From Manual of Procedure—1981—; Exhibit A-3 to Deposition of Herbert A. Pigman

**Pg. 7      ADMINISTRATION OF ROTARY  
INTERNATIONAL**

**Membership of R.I.**

The membership of R.I.. [Rotary International] is composed of 18,972 clubs with a membership of approximately 876,000 Rotarians (December, 1980). These individual Rotarians are members of their respective Rotary Clubs. The Rotary clubs are members of R.I. R.I. is the association of Rotary clubs throughout the World.

**Basic Policy of Rotary International**

1) First in order of importance is the advancement of the object of Rotary by the individual Rotarian.

2) The administration of Rotary International is important only insofar as it advances the object of Rotary through the application of the ideal of service by member clubs and individual Rotarians.

3) A fundamental principle underlying the administration of Rotary International is the substantial autonomy of the member Rotary clubs.

\* \* \* \*

**Purpose of Rotary**

\* \* \* \*

Rotary is an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world.

**Pg. 8: Board of Directors of R.I.**

The Administrative body of R.I. is a board of directors consisting of seventeen members, . . .

The board is the administrative body of R.I. and has control and management of the affairs and funds of R.I. in conformity with the constitution and by-laws.

**Pg. 12: Officers of R.I.**

\* \* \* \*

*President*

\* \* \* \*

Pg.13: 6) The president will be the representative of Rotary to heads of state, governmental and civic leaders, news media and the public.

Pg.14: *General Secretary*: The general secretary is the active managing officer of R.I. under the supervision of the president and control of the board. . . .

There is a staff of approximately 300 persons who, with the general secretary, form the R.I. secretariat with offices in Evanston, Illionis, U.S.A.; Zurich, Switzerland; Stockholm, Sweden; Sao Paolo, Brazil (March, 1981); Sidney, Australia (March, 1981); and Tokyo, Japan (March, 1981).

**Pg.30: CLASSIFICATIONS**

A Rotary club should have in its membership a representative of every recognized business or profession or institutional activity in the community in so far as it is possible to obtain such representation in conformity with the principles laid down in Art. V of the standard club constitution.

\* \* \* \*

A scientifically prepared list of classifications—some filled and some unfilled—is the logical basis for club growth. Such a list can be established only by making a thorough classification survey of the community in which the club is located, for it must be an index of the business and professional activities found within the territorial limits of the club.

**Pg. 31: *Classification Survey***

It is recommended that each Rotary club, through its classification committee, make a classification survey of the community as early as possible, but no later than 31 August each year and compile from the survey a roster of filled and unfilled classifications using the classified telephone directory and other business directories. . . .

In establishing its classification list a Rotary club may recognize as a "business," a "profession," an "occupation," a "concern," or an "establishment"

- a) any commercial activity
- b) any industrial activity
- c) any professional activity
- d) any institutional activity

sufficiently independent to determine generally its own policies and exercise responsibility, even though the financial control and the final determination of the financial policy of any two or more such activities may be vested in one corporate body or individual ownership, provided always that such an activity in itself constitutes a complete service to the public.

For example, if within a large university there are three separate and distinct divisions or schools, each having its own dean, its own faculty and each one sufficiently indepen-

dent to determine generally its own policies and exercise responsibility, the club should establish on its roster of filled and unfilled classifications a classification to cover the principal and recognized activity of each of the separate schools, such as:

Education—School of Medicine

Education—School of Engineering

Education—School of Law

The principle followed in establishing a classification for each separate and distinct division or school within a large university also applies in connection with the establishment of a classification for separate and distinct and independent divisions within a large corporation.

\* \* \* \*

#### *Toward Balanced Membership*

It is vital that a Rotary club have a well-balanced membership in which no business or professional group predominates.

It is preferable that the number of active members, including additional active members, whose classifications describe related or allied activities or activities owned or controlled by the same corporate body or other ownership, should not exceed 10 per cent of the total number of active and additional active members of the club.

\* \* \* \*

#### **Minimum Number of Classifications for New Club**

A prospective locality to be considered for the organization of a Rotary club must have a minimum of forty classifications from which to insure the possibility of perma-

nently maintaining a successful club of at least twenty members under Rotary's classification system.

**Pg. 33: News, Religion and Diplomatic Service**

The constitutional documents do not impose limitations upon the number of members a Rotary club may have representing the news media, religion and diplomatic service classifications.

**Pg. 34: CLUB ADMINISTRATION**

**Pg. 35: Guests at Rotary Club Meetings**

The board recommends that Rotary clubs make a special effort to urge individual members to invite guests to weekly Rotary club meetings at which especially interesting programs are scheduled in order that non-Rotarian members of the community may be better informed about the function of the Rotary club and its aim and objects.

**Pg. 36: Meeting Places**

The board recognizes that each club is autonomous in determining its place of meeting. However, as each active, senior active or past service member of a Rotary club is entitled to attend the meeting of any other Rotary club, it is expected that each club will meet in a place where any member of any Rotary club in the world can attend its meeting.

**Joint Meetings of Service Clubs**

. . . The board is not adverse to the holding of joint meetings with other service clubs on specific occasions.



**Pg. 37: Rotary Information**

\* \* \* \*

Clubs everywhere are encouraged to obtain full representation of the local press in their membership.

**Pg. 38: Business Advice and Assistance to Rotarians**

As a means of giving tangible effect to Rotary fellowship and of providing opportunities to render helpful service to club members, clubs are urged a) to establish committees to be comprised of several members, each representing a different major classification, for the purpose of giving confidential business advice and assistance to Rotarians who may request such help; b) to hold for the benefit of their members generally "clinics" or "forums" for the purpose of discussing those of their problems which are primarily of an economic nature.

**Speakers on Rotary**

The board encourages Rotary clubs to make available to various groups in their community speakers who can effectively talk about Rotary.

**Pg. 42: COMMUNITY SERVICE**

Rotary endeavors to develop the individual and through this development enable him to find his place in the community and to serve in that place; to cause him to consider his citizenship in its relation to the world, the nation and the community; and to think of his business or profession as an avenue for service.

## Policy Toward Community Service

The policy of Rotary toward community service is set forth in Resolution 23-34 adopted at the 1923 convention and amended at subsequent conventions.

### Text of Resolution 23-34

\* \* \* \*

4) . . . It is desirable that every Rotary club sponsor a major community service activity each fiscal year, varied from year to year if possible and to be completed if possible before the end of the fiscal year. This activity is to be based upon a real community need and should require the collective cooperation of all its members. This is to be in addition to the club's continuing its program for the stimulation of the club members to individual service within the community.

\* \* \* \*

6)

\* \* \* \*

c) While publicity should not be the primary goal of a Rotary club in selecting an activity, as a means of extending Rotary's influence, proper publicity should be given to a worthwhile club project well carried out.

\* \* \* \*

f) In all its activities a Rotary club acts best and is most successful as a propagandist. A Rotary club discovers a need but, where the responsibility is that of the entire community, does not seek alone to remedy it but to awaken others to the necessity of the remedy, seeking to arouse the community to its responsibility so that this responsibility may be placed not on Rotary alone but on the entire

community where it belongs; and while Rotary may initiate and lead in the work, it should endeavor to secure the cooperation of all other organizations that ought to be interested and should seek to give them full credit, even minimizing the credit to which the Rotary club itself is entitled.

**Pg. 44: Public Relations and Corporate Club Projects**

As a means of encouraging service activities which will result in improved public relations, the board of R.I. emphasizes to clubs those parts of Resolution 23-34 which recommend that it is desirable that every Rotary club sponsor a major community service activity each fiscal year.

**Participation in "Service Activities" Encouraged**

Rotary clubs and Rotarians should engage more in community service and should not be reluctant to let the public be advised through the press and otherwise as to what Rotarians in the community are doing in community service.

\* \* \* \*

As a basis for effective community service action, clubs are urged:

\* \* \* \*

c) to meet with other community service organizations for discussion and exchange of ideas where such meetings are feasible and needed and can be undertaken in harmony with established policy.

\* \* \* \*

Every Rotarian should personally become aware of the many and varied factors which cause discontent and dis-

order, and should make a personal appraisal of the ways in which these factors could be alleviated. Efforts should be continued to guide and encourage local efforts in deserving and necessitous communities towards relieving conditions of ignorance and unrest and assisting in the promotion of basic things such as education, health and nutrition.

### **Rules of Procedure for a Community Service Council**

When the executive officers of the several service clubs or other organizations in a community recognize the need to meet from time to time in a community council to discuss and exchange ideas regarding the community service of their respective organizations, the representatives of a Rotary club may participate under the following rules of procedure:

\* \* \* \*

Pg. 45: If and when there is a subject which seems to require joint action on the part of all organizations in the community, the decision as to the action each organization will undertake should be reached first in that organization. . . .

### **Pg. 46: Traffic Safety**

Each club is urged to give consideration to the appointment of a traffic safety committee as a sub-committee of the community service committee to study the question of traffic safety and to cooperate in any way possible with the local safety committee.

### **Adult Illiteracy**

Adult illiteracy continues to be a major problem in many parts of the world. While it is unwise to compete with governmental and other agencies active in promoting adult

literacy, there is much that can be done by individual Rotary clubs. To this end, Rotarians should inform themselves of what is being accomplished to meet existing needs so that all may be informed as to the nature and scope of the adult illiteracy problem as a basis for developing possible activities or projects in this field of endeavor.

### **Rural-Urban Relations Promotion**

The promotion of better relations between the rural and urban peoples of the world is a worthwhile activity for clubs, which will aid in accomplishing the objectives of R.I. . . .

### **Participation in Fund Raising Activities**

In participating in or identifying itself with any schemes to collect funds, or any other activity, a club should be continually careful not to indulge in undignified practices which do not contribute to the upbuilding and strengthening of the club's prestige.

It is assumed that the activities of a Rotary club will always be such as to promote the highest regard for the organization on the part of both Rotarians and non-Rotarians. . . .

### **Pg. 47: Road Signs**

The general secretary is instructed to call to the notice of all clubs which have provided, or are providing, road signs in their communities the necessity for keeping them in proper condition, believing that a poor road sign is a reflection on the community as well as the club.

### **Organizations of Women Relatives of Rotarians**

Many Rotary clubs are privileged to have ladies committees or other associations composed of women relatives of Rotarians cooperating with and supporting them in ser-

vice and other Rotary club activities. The board of directors encourages and commends such groups for the fine work which they perform.

**Pg. 48:        CONSTITUTIONAL MATTERS**

**Pg. 50:    Incorporation of Rotary Clubs**

\* \* \* \*

2) The board approves certain general provisions for articles of incorporation as follows:

\* \* \* \*

This corporation shall be a non-profit corporation. Its purpose shall be charitable and benevolent and to encourage, promote and extend the object of Rotary International, and to maintain the relations of a member club in Rotary International.

**Pg. 52:                CONVENTION**

\* \* \* \*

The purpose of the annual convention of Rotary International is to stimulate, inspire and inform incoming Rotary International and Rotary club officers at an international level, particularly incoming district governors and incoming club presidents, in order that they may be motivated to actively develop Rotary at the district and club levels . . . .

**Pg. 53:    Guidelines for International Convention**

**Pg. 54:    5. Major speakers should be strongly briefed and advised to relate their topics to Rotary, especially if they are non-Rotarians . . . .**

\* \* \* \*



10. Much can be achieved through public relations, but the necessity and the effect would vary each year depending on the country in which the convention is to be held. Continuity in the convention committee will be of great assistance. The proper use of public relations counsel should be considered.

**Pg. 56: Relationship of the Host Club to Rotary International**

**Pg. 57: Responsibilities of the Host Club include:**

\* \* \* \*

organizing local publicity;

**Meeting Places**

\* \* \* \*

It is not contemplated that the Rotary club of any city shall have to pay rental or other expenses for a convention hall for the use of R.I. but that the city as a community will furnish such facilities, or that the city government, or the chamber of commerce, tourist association or a similar group of businessmen, hotel men, etc., should provide the funds, if necessary, for such a meeting place.

**Conventional Operational Functions**

*Publicity.* The general secretary will have primary responsibility to the committee and the board for publicity on the convention, proceeding with the cooperation of the convention committee and the host club.

**Pg. 64: Convention Proceedings**

**Pg. 65:** *It is further resolved* that a complimentary copy of such printed and bound proceedings of each convention



shall be sent to each member club of R.I. and other persons as the board of directors may determine, it being understood that in addition to such gratis distribution of such proceedings books the board of directors may provide additional copies thereof to be sold at such price and to such persons as the board may determine.

\* \* \* \*

*Copyrighting:* The convention proceedings should be copyrighted, in order to protect R.I. from having commercial organizations take reprints from the proceedings.

*Printing and Distribution:* A sufficient number of copies of the proceedings book of each convention shall be printed to supply a gratis copy to each club and to furnish copies for a complimentary distribution as may be deemed advisable by the general secretary. Copies to be sold are to be made available at a price to be determined by the general secretary in keeping with the cost of production of such proceedings.

### **Rotary Emblem Merchandise Displays**

Every year, subject to the availability of space at convention sites, and the practicability and feasibility of such activity as determined by the general secretary with the advice of the convention committee, those firms and others licensed by Rotary International to use the Rotary, Interact, or Rotaract names and emblems in connection with the sale of emblem merchandise may be provided display booth space for the purpose of selling or accepting orders for sale of items covered by their respective licenses. Such space is to be made available to licensees under conditions specified by Rotary International and on the basis of a fee to be paid to Rotary International for the space.

**Pg. 68: DISTRICT ADMINISTRATION**

**Policy Governing Creation of Districts**

For the purpose of more efficient administration the board is authorized to group member clubs into districts. . . .

**Pg. 71: District Governor**

The administration of clubs under the direct supervision of a district governor is a sound procedure and should be continued; . . .

**Pg. 81: Three Point Co-Equal Avenue of Activity**

In order that Rotary may exert its widest influence, *emphasis* should be placed on the responsibility of the governor to carry out in his district the following three-point co-equal avenues of activity:

\* \* \* \*

a) The organization of a Rotary club in every community wherever it can reasonably be expected that a successful club can be maintained.

b) The filling of as many as possible of the classifications in each club and in so doing placing emphasis on securing the best candidate for any open classification. All things being equal the younger of two men in a classification is to be chosen so as to keep down the average age of the club.

**Pg. 83: District Conference**

A conference of Rotarians is held annually in each district . . . .

**Pg. 84: Conference Program:** . . . In the preparation of conference programs governors are requested to have Rotary

topics predominate and, in instances where non-Rotarian speakers appear on the program, to endeavor to have the subjects of their presentations directly associated with the object of Rotary.

**Pg. 85:** The board recommends that, as a means of gaining improved publicity for Rotary, district governors include in their district conference programs one or more recognized personalities whose message represents a newsworthy event, and whose message relates to the activities and the object of Rotary.

**Pg. 89: Honorary Governors and Patrons**

In those districts desiring to confer on a person an appropriate title which recognizes that person's support of Rotary, the conferring of such title shall be reserved for heads of government and members of royalty, or their representatives as may be deemed appropriate by Rotarians of such districts.

**District Speakers Services**

The board encourages district governors who have a district speakers service or bureau to include in the listings of speakers available through such service or bureau men who can tell the story of Rotary effectively to groups other than Rotary.

**Pg. 92: EXTENSION OF ROTARY**

The board of R.I. is charged with the duty of doing whatever may be necessary for the extension of rotary throughout the world.

\* \* \* \*

## **General Policy**

The club is the medium by which the program of Rotary is promoted and the object of Rotary is obtained. Therefore, in order that Rotary may exert its widest influence, it should progressively establish new clubs throughout the world wherever and whenever it can reasonably be expected that a successful club can be maintained.

### **Pg. 93: Prospective Localities for Clubs**

\* \* \* \*

Granted that a certain locality can reasonably be expected to maintain a club successfully, the sooner the club is organized there, the better it will be for both the club and the locality. The theory of waiting for a locality to indicate that it wants Rotary, is unsound. It is the duty of Rotarians to create in a locality the desire for Rotary. Rotarians in extending Rotary are seeking to give—not to get. It is better to risk the failure of a club than to withhold Rotary from any locality.

### **Pg. 94: Surveys**

It is expected that the governor will, as soon as possible, preferably during the first six months, cause to be made and recorded a survey of each locality having no club, to determine whether or not it is possible to organize a club which will succeed and prove to be an asset to the locality. . . .

## **Special Representatives**

It is the duty of all governors to take advantage of every opportunity to form a successful new club and it is the duty of every club and all Rotarians to cooperate in this work.

The governor, if unable to direct personally the actual work of organizing, should appoint some well-informed Rotarian from a nearby club, as his special representative for the organizing of the new club.

\* \* \* \*

### **Governor's Extension Aide**

The term "governor's extension aide" designates a Rotarian experienced in the work of organizing clubs, who is named by the governor to give assistance to special representatives in his vicinity in cases where the special representative appears unable to complete, without assistance, the organization of a club in the locality assigned to him and where the governor is unable to render the necessary assistance. In special circumstances, the extension aide may find it advisable to organize a club himself.

\* \* \* \*

### **Provisional Club**

An organizing group, from its first organization meeting, providing it meets regularly each week, is called a "provisional Rotary club" until it has been admitted to membership in R.I.

### **Pg. 97: Fees and Dues**

The board will not admit to membership any club in the United States and Canada which does not have an admission fee of at least \$20.00 and annual dues of at least \$25.00. . . .

### **Charter fee**

A charter fee of \$150.00 (United States currency) shall accompany the application from a provisional club for membership in R.I.

\* \* \* \*

### **Additional Clubs**

Pg. 98: . . . District governors are to encourage the organization of additional clubs in large cities wherever it is reasonable to think that there exists the possibility of permanently maintaining a successful club of at least twenty members under Rotary's classification system.

Pg. 99: The board believes that there should be a planned program for organizing new clubs in communities in which there is only one club, and wherein there are sufficient classifications from which to ensure the possibility of maintaining successful clubs of at least twenty members under Rotary's classification system.

\* \* \* \*

The board agrees that continued emphasis be given to the advantages of organizing additional Rotary clubs in large cities through the release of territory by existing clubs and, to this end, calls to the attention of clubs located in cities, boroughs or other municipal areas which are known to include, or may include, one or more localities which can be clearly defined, and which contains within each such locality at least the minimum number of classifications required for the organization of a new club, the desire of the board that such clubs be encouraged to take positive steps to ascertain the extent to which such localities exist and, where applicable, to initiate the procedure for organizing a Rotary club.



## **Communities with Other Service Clubs**

In some instances the principal reason given for the failure to undertake the organization of a Rotary club in a community is the fact that the community already has a service club. The existence of another service club or clubs in a community should not be the determining factor in deciding that a community cannot support a Rotary club.

\* \* \* \*

## *Terms of Reference for Admission of Clubs Committee*

The general secretary shall approve or disapprove applications from provisional Rotary clubs for membership in R.I. in accordance with established procedure.

When the general secretary admits a club to membership, the decision shall be published as the decision of the board and the board will ratify the decision at its next meeting. In the event the general secretary determines that an application not be approved, the matter shall be placed before the president of Rotary International for his instructions in accordance with the terms of reference of the admission of clubs committee.

\* \* \* \*

## **Extension at International Assembly**

It is important that the subject of organizing new clubs be adequately presented on the program of the international assembly by someone who is both informed and enthusiastically favorable to the organization of new clubs. Such presentation should stress very specifically the various means available to the governor for promoting the organization of new clubs within the district, such as the appointment of a district extension committee, special



representatives, governor's extension aide, etc. This presentation is to be supplemented at the assembly by individual contact with the governors by the secretariat to discuss extension possibilities within each district.

Pg. 102: **FINANCIAL MATTERS**

The constitution and by-laws of R.I. provide that the board shall have control and management of the affairs and funds of R.I. and that each year the board shall adopt a financial budget for the succeeding fiscal year.

\* \* \* \*

*Investment Policy*

1) The board shall designate from time to time the moneys not required for current purposes, which shall be set aside for general fund investment . . .

2) Objective:

In the general fund and the headquarters building replacement fund, the highest rate of return consistent with the preservation of capital in real terms and good marketability.

\* \* \* \*

*Investment Operating Procedures*

\* \* \* \*

1) There shall be an investment advisory committee appointed by the president and consisting of Rotarians who are knowledgeable and experienced in the field of investments as follows:

\* \* \* \*

Pg. 103: 2) There shall be an investment manager(s) appointed by the board who, within the scope of the current investment policy and these procedures, shall be authorized to manage, invest, and/or reinvest any or all funds made available for investment management.

3) The investment advisory committee shall be informed as to the content of the general fund investment portfolio and the headquarters building replacement fund investment portfolio, the investment policy of R.I. and the activities of the investment manager(s) in the implementation of that policy. The committee shall monitor the activities of the investment manager(s) in the investment and reinvestment of R.I. funds and shall counsel with the investment manager(s) as it may deem appropriate or as the board may instruct.

#### 4) Reporting Procedures

a) The investment advisory committee shall report to the board and to the finance committee its activities, observations and recommendations with respect to investment of R.I. funds.

b) The investment manager(s) shall be responsible for the following reports:

a monthly statement containing each transaction and a quarterly statement of market and cost value to be sent to the members of the investment advisory committee, the liaison director(s), to any branch office manager(s) who may be authorized, and to the general secretary for internal distribution, including the finance committee;

a report of each transaction shall be sent to the controller.

5) The finance committee at each of its meetings shall review:

- a) the report(s) of the investment advisory committee;
- b) the investment policy of R.I.;
- c) the investment operating procedures;
- d) the nature and content of the general fund investment portfolio;
- e) the nature and content of the R.I. headquarters building replacement fund portfolio;

and submit its observations and recommendations thereon to the board.

6) In harmony with the investment policy, Rotary International funds as designated by the board for investment may be invested in the following countries and/or currencies: the United States of America, and/or the Federal Republic of Germany, and/or Switzerland, and/or Japan, and/or Canada and/or the Netherlands, and/or the United Kingdom, and/or South Africa.

#### **Pg. 104: Revenue of R.I.**

The principal sources of the revenue of R.I. are per capita dues from clubs; convention and regional conference registration fees; charter fees from new clubs; sale of publications; subscriptions and advertising income from the magazine; license fees and royalty payments and interest and dividends on investments.

#### **Per Capita Dues**

Each club pays to R.I. for each and every active, senior active and past service member of such club annual per capita dues of \$17.00 . . .

### **Subscription to the Rotarian**

The subscription price of THE ROTARIAN IS \$5.50 United States currency per annum, \$7.00 in India, Bangladesh and Nepal, and \$6.00 per annum in other countries.

For each club in the United States of America and Canada it is a condition of membership that its active, senior active, and past service members become paid subscribers to the official magazine and continue as such.

Each club outside of the United States of America and Canada makes it a condition of membership that its members become and remain paid subscribers to the official magazine of Rotary International or a regional Rotary magazine approved and prescribed for the club by the board of directors of Rotary International. . . .

### **Subscriptions to Revista Rotaria**

Subscription to the Spanish edition of the magazine REVISTA ROTARIA, is mandatory for members of clubs in Spanish-speaking countries. The subscription price of REVISTA ROTARIA is \$7.50 United States currency per year.

### **Pg. 114: INTERNATIONAL SERVICE**

At least two agencies are necessary for the development and maintenance of friendly, just, and peaceful relations between nations.

a) A legal system to define the rights of the parties concerned and to adjust the differences which always arise in human relations. This agency must necessarily be developed by and between governments.

b) A well-informed public opinion with a proper appreciation of the importance of international understanding and good will toward all peoples. The development of this understanding and good will among Rotarians and among the people at large is the specific task of international service in Rotary.

\* \* \* \*

### **Outline of Policy**

\* \* \* \*

#### *The Aim:*

The aim of international service in Rotary is expressed in the fourth avenue of service; namely, to encourage and foster the advancement of international understanding, good will and peace through a world fellowship of business and professional men united in the ideal of service.

#### **Pg. 115: Responsibility of the Rotary Club:**

\* \* \* \*

A Rotary club may properly provide a forum for the presentation of public questions where such a course of action is designed to foster the fourth avenue of service. Where such questions are controversial, it is essential that both sides be adequately represented.

When international subjects are presented and discussed in a Rotary club, the speaker should be cautioned to avoid giving offense to peoples of other countries and it should be made clear that a Rotary club does not necessarily assume responsibility for opinions expressed by individual speakers at its meetings.

A Rotary club should not adopt resolutions of any kind dealing with specific plans relating to international affairs. It should not direct appeals for action from clubs in one country to clubs, peoples, or governments of another country or circulate speeches or proposed plans for the solution of specific international problems.

\* \* \* \*

### *Position of Rotary International*

R.I. consists of Rotary clubs located in many countries with many points of view. Therefore, no corporate action or corporate expression of opinion will be taken or given by R.I. on political subjects.

### **Pg. 116: United Nations**

\* \* \* \*

The general secretary is instructed to bring to the attention of Rotary clubs program information and other helps in connection with the study of the charter and the activities of the United Nations to the advancement of world peace.

Continued publicity shall be given to the reports of observers for R.I. who attend meetings of the United Nations and its specialized agencies.

### **Pg. 117: World Community Service**

\* \* \* \*

The district world community service committee shall

\* \* \* \*



f) publicize world community service aims and achievements in all appropriate media—Rotary and non-Rotary—in the district;

**Pg. 118: World Contacts with Men in Same Classifications**

The board urges all Rotarians to further world contacts with other business and professional men of the same classification in all countries of the world in the interest of creating a community of understanding and influence and furthering international cooperation.

**Pg. 122: International Service in Educational Institutions**

\* \* \* \*

Rotary clubs and Rotarians are encouraged to assist students in schools, colleges and universities to avail themselves of the opportunities in educational institutions for the advancement of international understanding and good will.

Among the ways in which this may be done are the following:

\* \* \* \*

—inviting students from other countries, enrolled in local educational institutions, to attend meetings of the Rotary club and to provide programs for meetings of the club;

**Pg. 123: Study Groups**

Meetings between Rotarians and others are encouraged as study groups for the purpose of better informing themselves and to discuss problems and seek opportunities for



improving conditions and relations between peoples and countries experiencing tensions, and other countries.

**Pg. 134: MEMBERSHIP IN ROTARY CLUBS**

**Pg. 135: Skilled Craftsmen**

Within the framework of the standard club constitution, provision is made for skilled craftsmen possessing the qualifications therein set forth in Rotary clubs, and no modification of this provision is necessary in order to enable a club to admit such skilled craftsmen to Rotary membership where otherwise qualified.

**Pg. 136:** The by-laws of R.I. and the standard club constitution provide that a Rotary club may, subject to the approval of the holder of the classification, elect as an additional active member in the club any former active member of a Rotary club whose place of business or whose residence is within the territorial limits of the club and who is otherwise qualified for membership, provided that any member so elected shall have terminated his membership in his former club only because he ceased to be actively engaged within the territorial limits of that club in the classification of business or profession under which he was classified in that club. . . .

**Pg. 139: Extension Within the Club**

\* \* \* \*

In order for a Rotary club to be fully relevant to its community and responsive to the needs of those in the community, it is important and necessary that the club include in its membership all fully qualified prospective members located within its territory. To this end, it is inappropriate and inconsistent with the principles of Rotary

for any club to establish arbitrary limits on the number of members in the club or fail to increase its membership as a result of apathy or through lack of information or understanding as to the pattern of growth in the club or the procedures for proposing and assimilating new members.

It is important that each club establish and maintain a membership growth pattern which will result in an appropriate net growth in number of members, and each club should have a positive attitude toward membership growth, recognizing that an increase in number of members does not ipso facto mean, nor need it result in, a decrease in the quality of membership in the club. . . .

Inherent in the purpose of Rotary is the acceptance by individuals of their responsibility for the personal application of the ideal of service. It is important that individual Rotarians recognize that this responsibility includes an obligation on their part to share Rotary with others and to help extend Rotary through proposing qualified men for Rotary club membership.

### **Club Membership Development**

The board

1) encourages district governors to provide for a district membership committee,

\* \* \* \*

3) requests club secretaries to supply information about the causes of membership loss to district governors and district membership development committees and the district governors and such committees shall then take steps to help clubs eliminate loss of members;

4) emphasizes the following plan known as the "Five for One" plan, as a workable procedure to increase club membership:

Each club president to divide club membership into groups of five members; each group, insofar as possible, to include . . . a committee chairman . . .

As soon as possible, following appointment, each chairman to hold a meeting at his home or at another place of his choosing. The group at these meetings

a) to secure one new member in the Rotary year, preferably in the first six months;

\* \* \* \*

The club membership development committee (or a general chairman appointed by the club president) to supervise all groups and the general program and to be charged with the responsibility of seeing that

\* \* \* \*

Pg. 141: c) each group of five propose a prospective member with satisfactory qualifications:

\* \* \* \*

7) agrees that maximum emphasis be placed on the use of additional active membership as a method of increasing club membership and obtaining younger and enthusiastic members;

\* \* \* \*

As a means of attracting more qualified men to accept membership in Rotary and of reducing losses in the membership of clubs, the board encourages clubs

\* \* \* \*

2) to keep their services to their communities fully attuned to their needs, and to strive constantly to make them more meaningful;

Further, the board

1) emphasizes the need for each club to examine its membership growth patterns, consider whether or not it is satisfied with its achievements, then take steps to achieve sound growth;

2) urges that efforts by district governors and others be directed toward particular clubs which need assistance in achieving better growth and that these efforts meet head-on the real reasons for lack of membership growth, avoiding exhortations replete with timeworn phrases;

\* \* \* \*

The board agrees that the importance of good public relations in attracting new members in Rotary and in retaining present members continue to be emphasized to Rotary clubs, and, in particular, to club membership development committees.

#### **Pg. 142: Balanced Membership**

\* \* \* \*

Each Rotary club should have in its membership a representative of every recognized business or professional or institutional activity in the community in which the club is located in so far as it is possible to obtain such representation in conformity with the classification and membership principles set forth in the R.I. by-laws.

Each Rotary club should prepare annually a classifications survey of its locality and compile from such survey a roster of filled and unfilled classifications as the logical basis

for building a balanced club membership representing a true and broadly-based cross section of the business and professional life of the locality.

The board urges that

a) district governors emphasize and encourage greater use of provisions relating to senior active membership, additional active membership, active membership based upon residence, and the one year leave of absence which can be granted to an active member moving his place of business or residence to another Rotary locality, recognizing that these provisions offer substantial opportunities for Rotary club growth, and directs that appropriate publications of R.I. include items of similar emphasis and encouragement;

\* \* \* \*

d) continued emphasis be given to the importance of Rotary clubs bringing into membership younger men, urging all Rotarians, in particular, to make full use of additional active membership provisions.

#### **Pg. 143: Representative Membership Within Clubs**

Each Rotary club should be a true cross-section of the business and professional life of the community in which it is located. . . .

#### **Additional Active Member**

Emphasis should be placed on the provision for additional active members through every channel of the organization. Clubs are urged to make use of this provision as a means of bringing into Rotary more men to enjoy the privileges of Rotary and at the same time increase the number of Rotarians. . . .

Rotary clubs are reminded of the opportunities for electing additional active members under provisions of Article III, Section 3, of the R.I. by-laws as a means of enabling Rotarians moving to other communities to continue their Rotary membership, thereby reducing the number of Rotarians who lose their membership as a result of removal from the community in which they hold membership in a Rotary club.

\* \* \* \*

### **Inviting Prospective Member to Club Meetings**

The board looks with favor on the adoption by clubs of the practice of inviting a prospective member to several regular meetings of the club before the prospective member is asked to sign an application card.

### **Pg. 144: Providing Membership for Young Men**

Every effort should be made by clubs to obtain younger men as members of the clubs, particularly by taking advantage of the provision for additional active members, and also by inviting younger men to accept active membership in the classifications vacated by those who have become senior active members.

\* \* \* \*

The formation of additional Rotary clubs in the well-defined commercial or trade centers of large cities is urged as one method of securing younger men in Rotary clubs.

### **Pg. 146: Students as Rotary Club Guests**

Clubs are encouraged to take an interest in students at universities and schools and to see that they are familiar with the ideals and principles of Rotary. The board is in



sympathy with any plan whereby clubs invite students to be guests at club luncheons and desires to encourage clubs to have such guests, but students as such cannot be members of a Rotary club. . . .

**Pg. 147: NAME AND EMBLEM**

**Pg. 148: Protection of Name and Emblem**

**Pg. 149:** In 1954, the Rotary emblem was registered as a service mark on the principal register of the United States Patent Office. The emblem also is registered in the U.S.A. as a trademark and as a collective membership mark. The Rotary name has been registered as a service mark on the principal register of the U.S. Patent Office. Through such registrations, R.I. has been successful in recent years in preventing others from making use of the Rotary emblem; also, the organization has been able to prevent others from using the Rotary name when such use might tend to confuse the public generally by indicating or implying a relationship which does not exist.

**Authorization to Use Emblem**

**Pg. 150:** The board authorized and instructed the general secretary to develop such a license fee and royalty procedure, including a form of agreement and license, such procedure to provide that, in consideration of authorization granted by R.I. to firms and individuals to manufacture, sell or use the Rotary emblem, such firms and individuals shall be required to pay to R.I. a license fee and an annual royalty on the annual gross sales of Rotary emblem merchandise.

**Pg. 151: Proper and Improper Uses of Name and Emblem**

\* \* \* \*



*The use of the Rotary emblem is authorized*

\* \* \* \*

e) As a lapel button to be worn by Rotarians and ladies connected with Rotary.

**Pg. 156: Organization of Women Relatives of Rotarians**

In consideration of the fact that the constitutional documents of Rotary International include no provision for women's clubs auxiliary to Rotary clubs or for other similar organizations of women relatives of Rotarians . . .

1) formal official, legal recognition cannot be given to organizations of women notwithstanding that they may be established as auxiliary to Rotary clubs;

\* \* \* \*

Nevertheless, appreciating the valuable cooperation and participation of women relatives of Rotarians, whether as individuals or as groups, in the community service and other activities of Rotarians and Rotary clubs, and

—recognizing that women are becoming more and more involved in public service of all kinds, and

—being aware of the interest manifest by women relatives of Rotarians in some communities in associating themselves for the purpose of service work in cooperation with and in support of the service activities of Rotary clubs, the board does not wish to discourage women relatives of Rotarians from organizing in local groups separately from the Rotary club, for the purpose of having among their objectives the support of Rotary club activities.

**Pg. 157: Rotary Mottoes**

\* \* \* \*

*Whereas* the words "Service Above Self" and "He Profits Most Who Serves Best," have been consistently and widely used in the nature of mottoes for R.I. for forty years in effective expression of the Rotary basic ideal of service; and

*Whereas* such usage has served to indelibly fix in the minds of the public and Rotarians these words as a part of Rotary's principles and object;

\* \* \* \*

*Be it resolved* by R.I. assembled in its forty-first annual convention that "Service Above Self" and "He Profits Most Who Serves Best" be designated as Rotary mottoes which may be used in Rotary literature and elsewhere.

**Pg. 160: PROGRAM OF ROTARY**

\* \* \* \*

The object of Rotary is to encourage and foster the ideal of service as a basis of worthy enterprise

\* \* \* \*

**Fundamental Characteristics of Rotary**

\* \* \* \*

3) A Rotary club selects its members on a basis of classification in accordance with the nature and place of the individual's business or professional activities.

**Pg. 161: Purpose of Rotary**

\* \* \* \*

Rotary is an organization of business and professional men united worldwide who provide humanitarian service,

encourage high ethical standards in all vocations, and help build goodwill and peace in the world.

Pg. 166

## **PUBLIC RELATIONS**

\* \* \* \*

The primary purpose of a public relations program in Rotary is to foster a favorable, acceptable atmosphere in which a Rotary club and individual Rotarians may best function to achieve the object and aims of Rotary. Without public understanding, recognition and appreciation of the purpose, programs and accomplishments of Rotary, many Rotary efforts will fall short of their full potential. Failure to interpret the purposes and worthwhile programs of Rotary to the public, business and professional men, and to Rotarians will seriously hinder the growth and development of Rotary and often result in the actual loss of Rotary membership. Seldom can a Rotary club become totally effective in its service activities without community understanding and support.

A positive climate in which Rotary may thrive is achieved through a broad program of good public relations. The board urges club public relations committees to take a comprehensive approach to public relations, by using not only the techniques of constructive publicity and the channels of the communications media, but by creating sound programs of information, interpretation, cultivation and community understanding.

The programs of good public relations should include, but not be limited to:

\* \* \* \*

2) Maintain friendly relationships with leaders of all mass communications media and develop effective pro-

grams to utilize newspapers, radio, television, magazines, and films in telling the Rotary story;

\* \* \* \*

5) Effective use by Rotary clubs of the official magazine and other publications, resources and programs of Rotary International which help interpret Rotary's aims in the community;

6) Devise continuing programs of internal communications for individual Rotarians, their friends, families and associates to help them better understand the aims of Rotary;

7) Cultivate the understanding of community leaders, young people, and other special interest groups who should be aware of Rotary, its object, scope, programs and activities.

\* \* \* \*

### **Attracting Men to Rotary Through Public Relations**

#### **The board**

1) encourages Rotary clubs worldwide to find ways and means of increasing the appeal of Rotary to the growing number of young men who are occupying positions of responsibility in business and professions;

2) urges Rotary clubs to take measures to have appropriate weekly Rotary club programs better reported and identified with the object of Rotary;

3) suggests to Rotary clubs worldwide that they consider adopting more sharply focused activities as a means of providing greater public relations impact.

The board agrees that the importance of good public relations in attracting new members to Rotary and in retaining present members continue to be emphasized to Rotary clubs and, in particular, to club membership development committees.

### **Public Relations and Club Projects**

\* \* \* \*

A service project well carried out is considered one of the best methods for extending the public understanding of Rotary. Therefore, it is essential to the public relations of Rotary that clubs actively seek to inform the public about the projects well performed by a Rotary club.

\* \* \* \*

### **Rotary and News Media Relationships**

The board encourages Rotary clubs and district governors to undertake appropriate action to improve relationships between Rotary and the news media and suggests for consideration taking into account local, social and cultural conditions and the state of local media relations, the following Rotary club and district activities to improve Rotary and news media relationships:

1) Talks to Rotary clubs by news media personnel on the role of the media;

2) Small discussion groups comprised of Rotarians and news media personnel;

Pg. 168: 3) Forums or seminars attended by Rotarians and news media personnel;

\* \* \* \*

6) Increased efforts to bring representatives of the news media into Rotary club membership;

### **Speaker Services**

The board encourages

a) district governors who have a district speakers service or bureau to include in the listings of speakers available through such service or bureau men who can tell the story of Rotary effectively to groups other than Rotary;

b) Rotary clubs to make available to various groups in their community speakers who can effectively talk about Rotary.

\* \* \* \*

### **Public Information on Assembly Programs**

In planning the programs for the international assembly and the district assemblies care should be taken to include topics which will be helpful in bringing before the public information concerning Rotary.

Pg. 169: **PUBLICATIONS OF R.I.**

\* \* \* \*

### **Official Magazine**

The board of R.I. publishes a monthly magazine which is the official magazine of R.I. . . . there are two editions—the basic edition, in English, known as THE ROTARIAN and the Spanish edition known as REVISTA ROTARIA. . . .

## Advertising Policy

\* \* \* \*

### I) *General Policy*

The magazine shall actively solicit high-grade advertising from reputable advertisers of worthy goods and services.

### Pg. 170: III) *Free Advertising*

Free advertising shall be available only to Rotary International.

\* \* \* \*

## R.I. News

Pg. 171: ... The purpose of R.I. News is to transmit to club officers official communications and other items of general and timely interest.

\* \* \* \*

The R.I. News is not intended for general distribution. Subscriptions for individual club members are available at an annual subscription rate.

\* \* \* \*

## Directories

Each Rotary year, R.I. issues an OFFICIAL DIRECTORY containing a list of all the clubs, the names and addresses of their presidents and secretaries, time and place of meetings, names and addresses of the officers and committeemen of R.I., and other information appropriate to such a publication.

... The directory is not for distribution to non-Rotarians. ...



Published as part of the OFFICIAL DIRECTORY, for the convenience of Rotarians who travel, is a hotel directory carrying the advertising cards of a partial list of hotels which are owned or operated by Rotarians or which are meeting places or headquarters or Rotary clubs. Also, for the information of club secretaries and others who may have occasion to purchase Rotary emblem merchandise, the directory includes a list of those firms which have been licensed by R.I. to manufacture and/or sell specifically approved items bearing the Rotary, Rotaract or Interact name and emblem.

\* \* \* \*

### **Pamphlets**

Various pamphlets are issued by R.I. covering special subjects. See R.I. Pamphlet 19 and "Catalogue" for a complete list, including prices for all publications, pamphlets, forms, supplies, etc., . . .

### **Pg. 173: REGIONAL CONFERENCES**

\* \* \* \*

The board looks with favor in principle on the holding of regional conferences of R.I. whenever and wherever there is a reasonable expectation of a successful conference being held which will advance the program of Rotary.

The board agrees that when selecting regional conference sites the following be taken into consideration:

1) There must be at least 10,000 Rotarians in the "primary attendance area". . .

3) That a minimum of 2,000 Rotarians can be expected to attend the conference.

The board will expect the city to provide without expense to R.I., a suitable, adequate and convenient auditorium for the general sessions of the conference and other similar meeting places for other sessions of the conference. It is not contemplated that the Rotary club of any city shall have to pay rental or other expenses for a conference hall for the use of R.I., but that the city as a community will furnish such facilities, or that the city government, or the chamber of commerce, tourist association or a similar group of businessmen, hotel men, etc., should provide the funds, if necessary, for such a meeting place. . . .

**Pg. 176: Public Relations for Regional Conference**

The board has agreed that in planning the program for a regional conference, recognition should be given to the public relations aspects of the program so that specific public relations objectives may be achieved in the region as well as increased general visibility for Rotary through publicity of the meeting.

**Pg. 189: SERVICE TO YOUTH**

**Method of Procedure**

Where service to youth is an activity of clubs, governors are urged to suggest to the clubs in their districts that they make a community-wide survey as a most effective way to ascertain the needs and opportunities of youth in their respective communities so that plans may be formulated and the cooperation of various community agencies enlisted for undertaking activities and projects revealed by such a survey.

**Pg. 191: Rotary Club's Relationship to Service to Youth Organizations**

Pg. 192: 2) *Means of Contact*. The youth committee of a club should confer with all existing service to youth organizations and give every assistance in coordinating their work and eliminating duplication. . . .

A club may initiate community action for the organization and establishment of an advisory council. . . .

3) *Aiding Financially*. Where a financial need exists in an organization which a club desires to help, the preferable course to follow is to organize a campaign to secure the support of the general public to such organization, enlisting the cooperation of other interested agencies, so that all may have an interest in the organization and its work, the Rotarians individually contributing to the success of such campaigns as other citizens of like ability are expected to do.

**Pg. 232: VOCATIONAL SERVICE**

**Pg. 233: Business Relations Conferences**

District governors are urged to consider and discuss with other Rotarians in the district the possibility and advisability of the district sponsoring a business relations conference during the year.

\* \* \* \*

**Employer-Employee Relations**

The board suggests to clubs that, with a view to fostering good employer-employee relations,

a) clubs arrange at their own meetings and encourage at meetings of other groups in their communities, programs

on cultural, economic and geographic conditions in countries other than their own as a means of helping to overcome possible difficulties arising from language barriers and differences in cultural and social backgrounds as a result of the mass movements of workers from one country to another;

• • • •

d) clubs from time to time invite labor representatives together with representatives of employer organizations, if so desired, to meetings featuring addresses or debates on relevant subjects;

• • • •

### **Standards of Correct Business and Professional Practice**

Pg. 234: Increased publicity should be given to Rotary's activities and those of individual Rotarians in behalf of correct practices in business, . . .

(Handwritten headings, titles, and page numbers changed to type in printing)

**Excerpts from Rotary Basic Library  
(Pigman depo. Exh. B)**

**Volume 1, *Focus on Rotary***

**"What is Rotary?"**

Rotary, the world's first service club organization, can be described in many ways.

Functionally, Rotary is an association of local clubs gathered into a larger organization called "Rotary International." The individual Rotarian—the heart and soul of Rotary—is a member of his *local* club; all clubs are members of Rotary International, which is headquartered at Evanston, Illinois, U.S.A.

Officially, Rotary is defined as "an organization of business and professional men united worldwide, who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world."

Specifically, a Rotary club is composed of business and professional men in a community who have accepted the Ideal of Service as a basis for attaining fulfillment in their personal, vocational, and community life. In fact, the Ideal of Service, exemplified in the motto "Service Above Self," is the thread that runs around the Rotary world and unites likeminded men in thought and action, no matter what part of the world they live in—whether it be in Iceland, with its glaciers, volcanoes, and geysers; in sunny Greece; in farm towns of the U.S.A. Middle West; in the Lake District of Cumbria, England; in thriving, tropical Nigeria; in forested

Papua New Guinea; in the heart of urban Tokyo, Japan; or in mountainous, landlocked Bolivia.

Nowadays, more than 900,000 service-minded men belong to about 20,000 Rotary clubs in almost 160 lands. Clubs meet weekly, usually for lunch or dinner, so that all members may enjoy each other's fellowship before they get down to the business of running the club and discussing its service goals. Membership is by invitation only, and is based on choosing one representative of each business, profession, and institution in the community. The purpose of this "classification" system is to ensure that the members of each club comprise a true cross section of their community's business and professional life or endeavor.

The earliest meetings of "Rotarians" were held in the name of "acquaintance" and good fellowship, and they were designed to produce increased business for each member. However, the founders soon realized that this would not be enough to keep busy men interested and involved on an enduring basis. Thus, as the organization expanded, it deepened its purpose and developed its ideal of "Service Above Self," which it expects its members to carry into the marketplace, the office and factory, the community at large, and into other lands. Official policy now specifically prohibits any attempt to use the privilege of membership for commercial advantage.

Pgs. 1-2

\* \* \* \*

The service ideal began taking shape during this early period, when Arthur Frederick Sheldon joined the Chicago club. As a teacher of the new "science" of salesmanship, he believed that business should be regarded as a means to serve society, and at Rotary's first convention in 1910 he



proposed that "He Profits Most Who Serves His Fellows Best." The next year another of Rotary's early leaders, Benjamin Franklin Collins, also spoke of the importance of serving others and promoted the idea that a club should be organized on the principle "Service, Not Self." The two sayings, modified to "He Profits Most Who Serves Best" and "Service Above Self," were quickly embraced by all Rotarians and became proud slogans on Rotary clubs' escutcheons. But 40 years passed before they were officially designated as Rotary mottoes—at the 1950 Convention in Detroit, Michigan, U.S.A.

Pg. 9

### **"The Program of Rotary"**

Associations, like people, are known for what they stand for and what they accomplish. What Rotary clubs and Rotarians undertake to accomplish is called the Rotary program. If the clubs and their members perform that program well, Rotary as a service association will continue to grow and be respected around the world. Hence, full understanding of Rotary and its kaleidoscopic program of service in today's world is essential for all Rotarians.

Pg. 19

• • • •

New members are made aware, through Club Service, of what Rotary is all about—the objectives, scope, administration, achievements—and in a well-run club, they quickly come to appreciate the benefits and privileges of membership.

• • • •

*Vocational Service* is an obligation that derives from holding a classification in a Rotary club. Its purpose is to



stimulate every Rotarian to exemplify and share the Ideal of Service within his business or profession. To put it another way, Rotarians are encouraged to put into practice in their business and professional lives the high ideals of Rotary. This involves such matters as fostering good employer-employee relations and career guidance for young people, and historically it has involved Rotarians in promoting high standards of conduct by professional and trade associations.

Pg. 21

### **"How Rotary Is Administered"**

While it may be somewhat difficult to define Rotary's ethic, or any ethic for that matter, it is relatively easy to define Rotary International as, quite simply, an association of Rotary clubs. "Association" is the key word. The clubs are freely grouped together under the umbrella of Rotary International, and each club agrees to conform to the Standard Rotary Club Constitution. But within that framework and the R.I. Constitution and By-laws, the clubs develop plans and projects around the Four Avenues of Service that best answer the needs of their communities and local situations.

In other words, throughout the years there has been no attempt to create a single R.I. "corporate image." And this has been another source of Rotary's strength, for it permits worldwide diversity within an overall unity, minimizing the potential for conflict and maximizing the thrust toward harmony among clubs and Rotarians of different nations and cultures.

Pg. 33

\* \* \* \*

For the new Rotarian, his first international convention is an exposure to a broad and exciting experience that adds new dimensions to his understanding of the Rotary movement and brings him friends from many lands. It is a learning experience that makes lasting impressions. The meetings of the convention are justly famous for their colorful pageantry, international fellowship, the enthusiasm of the participants, and thought-provoking programs. The programs include outstanding entertainment, presented by artists of national (host country) and local renown, including folk dancers, singers, and symphony orchestra. There are also vocational craft assemblies, at which Rotarians share ideas and fellowship with other Rotarians from all over the world in the same related business and professional fields. Lasting friendships are formed.

Pgs. 38-39

\* \* \* \*

A key to the success of the Rotary movement—or any movement or organization—is communication. Indeed, there is no progress without communication. To this end, the Secretariat's Communications Division in the R.I. headquarters plays a vital role in preparing Rotary publications and audiovisual and public relations materials for distribution to clubs, districts, and a worldwide membership. In effect, a busy "publishing house" thus operates within the R.I. headquarters producing and revising a range of Rotary books, manuals, pamphlets, and periodicals. Many publications and other resources are issued in nine languages, and a few are produced in as many as 19 languages.

Pgs. 60-61

## **"The Rotary Club"**

With the exception of large cities, which often have more than one club, Rotary is organized on the basis of one Rotary club in each community. The active membership in each club is based on having but one representative of each distinct business or profession within the community. This would seem to be a restrictive provision, but its purpose is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross section of the business and professional life of the community. The premise is that men of authority and influence are in a position to serve and accomplish good works. This "classification principal," as it is known in Rotary, fosters a fellowship for service based on diversity of interest (the lawyer meets the engineer, the banker, the printer, the winegrower, the automobile dealer). It seeks to prevent the predominance in the club of any one group, and furnishes an atmosphere free from the restraints that might prevail in the presence of competitors. See further "Classification Principal" in *Club Service*, Vol. 2.

The Rotary club is intended to be really a *club*—a body of men who are knit together in bonds of personal friendship and service. Thus, regular attendance at weekly meetings is one of the conditions of club membership. Rotarians are specifically requested not to use the privilege of membership for commercial advantage. The rules of the club in this particular respect are jealously guarded by the general body of its members.

Every Rotary club is a member of Rotary International—the world organization which grants it a charter. (The latter, signed by the R.I. President, General Secretary, and the district governor, is issued from the Central Office of the Secretariat when the club is admitted to member-

ship.) Thus, each club is related not to its community alone, but to the whole world. The club whose vision is, unfortunately, limited to the locality from which it takes its name is only partly meeting its responsibilities.

And so it is with the individual Rotarian. As a member of the Rotary family, he has a universally recognized right of entry into any Rotary club meeting anywhere in the world and the accompanying privilege of acquaintance and opportunity of fellowship with Rotarians of all races, creeds, and colors. A Rotarian doctor from Mombasa, Kenya, can visit unheralded the Modum Club in Norway; a Japanese businessman from the Toride Club in Ibaraki can call at the Torino Club in Italy; while a Rotarian from Walla Walla, Washington, U.S.A., while vacationing in Australia, can visit the Wagga Wagga Club in New South Wales. As founder Paul Harris said: "Rotarians respect each other's opinions and are tolerant and friendly at all times. Catholics, Protestants, Moslems, Jews, and Buddhists break bread together in Rotary."

Rotary, then, is no more an institution for the narrow-minded nationalist than it is for the self-seeking businessman. Every Rotary club must have its windows and doors open to the whole world. Rotary membership offers rich opportunities for growth in international understanding and goodwill to the ordinary business and professional man in any community, large or small, in almost 160 countries. In fact, there are many men who have Rotary to thank for opportunities which otherwise never would have come their way: opportunities for leadership, travel, and cultural contacts, and for rewarding friendships with men in their own community and in other lands. Most important of all, their opportunities for service to the needy become global in nature and scope.

**Volume 2, *Club Service***

Pgs. 67-69

**"Classification Principle: Fundamental Building Block"**

Its purpose is to make certain that each Rotary club includes a representative of every worthy and recognized business, professional, or institutional activity in the community. In this way, each club strives to become a true cross-section—a microcosm—of the business and professional life of the city or town of which it is a part. Thus, the classification principle is one of the chief sources of the strength and diversity of Rotary. But classification and membership are intimately intertwined, and a word must first be said about the different kinds of membership open to Rotarians before detailing the workings of the classification system.

\* \* \* \*

Pg. 7

With certain exceptions provided for in the constitutional documents (*see* page 11), one active member is admitted for each classification, but he, in turn, may propose an additional active member, who must be in the same business or professional classification. (An additional active member is regarded as an active member for all practical purposes, except that he loses his classification when his proposer leaves active membership; often, in such circumstances, however, the additional active member is then elected to fill the classification as an active member.)

\* \* \* \*

Pg. 8

This unit began with a discussion of the classifications committee. How does that committee function? Its job is to verify the eligibility of a candidate for active membership from the standpoint of his proposed classification.



To do this, the committee updates the club's classification survey of the community as soon as possible after 1 July each year, when the Rotary year begins, and no later than 31 August. Using the classified section of the telephone book, a business directory, or information from the local chamber of commerce, the committee compiles a list of every commercial, industrial, professional, or institutional activity in the club's territory. In doing so, it recognizes that sometimes more than one activity within a single corporation is eligible as a classification; the test is whether or not the activity is recognized as a separate service and is generally independent enough to determine its own policies. For example, if a university includes several schools, each with its own dean and faculty, each school could be listed as a separate classification:

Education, School of Medicine

Education, School of Engineering

Education, School of Law

The same principle applies to independent divisions within a large corporation.

In industrialized societies, more and more specialization occurs. Thus, a category like insurance, for example, is now divided into specialties such as automobile, fire, casualty, life, health, and so on. Lawyers also often specialize in criminal, corporate, probate law, or in other specific areas. What would the classification of a lawyer or insurance man be? The key point is that the classification must describe the member's principal and recognized professional activity, or the activity of his firm or institution.

Some special situations call for special handling. One concerns men who live within a club's territory, but who work outside of it. They are eligible to fill a classification in

the club located in the place where they live, even though their business activities are outside the territory of the club.

Also, there are three groups to which the one-man, one-classification rule does not apply: clergymen, news media representatives, and diplomats. Any number of men in these classifications may belong to a Rotary club.

Pgs. 9-11

### **"Membership Development: Sharing Rotary's Benefits"**

A club's best insurance against growing old is to admit a steady stream of younger members. Further, during an average year about ten percent of the members may move away or drop out of a club. Therefore, to simply maintain the status quo in terms of numbers of members, a club needs to recruit that ten percent every year. It is the task of the membership development committee to keep a flow of prospects coming, to gradually enlarge the club with members of high quality.

Pg. 19

### **"Membership: Lifeblood of the Organization"**

Rotary clubs, according to the Standard Club Constitution, provide in their by-laws for detailed procedures for the admission of new members. There is no uniform set of rules that must be adopted by clubs, as long as the provisions of the club's by-laws are not out of harmony with the Standard Rotary Club Constitution and By-laws of Rotary International. The Board of Directors of R.I. has adopted Recommended Club By-laws for consideration by the clubs. What follows are the procedures for admission of membership as provided in the Recommended Club By-laws.

Pg. 29



### **"Programs: A Richer Understanding of Community and World"**

In the Club Service category... the program and membership development committees of a California, U.S.A., club targeted four meetings each year to attract potential members. For one of these, the club engaged the host of a popular television talk show and asked each member to bring a potential candidate for Rotary. A \$25 fine was levied against any member who failed to bring a guest. As a result of that one meeting, 23 qualified men joined the club—and the fines paid the speaker's fee!

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### **Volume 3, *Vocational Service***

#### **"The Growth of an Idea"**

Soon after the 20th century was born, Paul P. Harris, a young lawyer in Chicago, Illinois, U.S.A., had an idea that friendship and business could be mixed and that doing so would result in more business and more friendship for everyone involved. So, with three business friends, he launched what was to become the Rotary movement that has grown until it encircles the earth and now involves nearly a million men.

Pg. 5

\* \* \* \*

Paul returned to Chicago to open a law office. But making intimate friends—warm, honest companions with whom he could share good fellowship akin to that which he found in the small state of Vermont—was what he wanted most of all. And so he founded a small club—the first of the almost 20,000 Rotary clubs and of many thousands of

similar service clubs that came after—wherein friendship and business were blended to the advantages of both.

Paul recognized the difficulty of bringing business competitors together in fellowship in those days, so he limited membership in his club to one man from each line of business or profession. This was the beginning of Rotary's classification principle of membership, and it created a circle of friends who were not rivals.

Those who joined were men motivated primarily by the business they expected to receive from other club members, but within the club's friendly, non-competitive atmosphere, they soon found something even more satisfying—*fellowship*, the opportunity to confer with and enjoy the friendship of men of other occupations, and of being thoughtful of and helpful to them and the community at large.

As Paul Harris wrote in *My Road to Rotary*: "These early Rotarians helped each other in every way that kindly heart and friendly spirit could suggest. In the main their efforts were directed to keeping each other in business, helping each other to attain success. They patronized each other when it was practical to do so, exerted helpful influence, and gave wise counsel when it was needed."

"Exerted helpful influence" meant that the early Rotarian would encourage his "outside" friends and business associates to patronize his fellow Rotarians. "Wise counsel" was necessary on occasion. A Rotarian's advertising might seem misleading to his club members, or perhaps they might advise him to move his desk into his front office where he could greet his customers.

Chesley R. Perry, the first general secretary of R.I., who served in that position for 32 years, was one of the men

who helped most to make Rotary what it is today. In 1955 he told a Rotary business relations conference at LaSalle, Illinois, U.S.A.: "Well, those early Rotarians were not all angels by any means. There probably were some things in some of their business practices that needed correction. At any rate, not even a fellow Rotarian could be expected to patronize, and much less could he be expected to recommend his friends to, any Rotarian, the quality of whose wares or the reliability of whose service was not of the highest type."

Thus, it became evident to these early Rotarians that if higher business standards were possible they should be discovered and adopted, that the word "Rotarian" in business must be equivalent to the word "sterling" stamped on a piece of silverware.

It was a momentous realization, for it marked the beginning in Rotary of emphasis on ethical business methods, now termed "Vocational Service." It began with the first Rotary club and was an inevitable result of mixing friendship and business.

Pgs. 6-8

\* \* \* \*

"The distinguishing mark of the commercialism of the 19th century was *competition*—do others before they do you. In this 20th century the human race is approaching wisdom. The distinguishing mark of *this* century is to be *cooperation*. As man comes into the light of wisdom he comes to see that right conduct toward others pays, that business is the science of human service, and that *he profits most who serves his fellows best*." It was a phrase destined to endure.

Next year, at the Portland (Oregon, U.S.A.) Convention, another of Rotary's early leaders spoke of the importance of serving others. Benjamin Franklin Collins, then president of the Rotary Club of Minneapolis, Minnesota, U.S.A., promoted the idea that the proper way to organize a club was through the principle that had been adopted by his club—"Service, not Self." The two slogans, slightly modified to "He Profits Most Who Serves Best" and "Service Above Self," came into use as early as 1911. (They were not officially designated as Rotary mottoes, however, until the 1950 Convention in Detroit, Michigan, U.S.A.)

Pg. 9

### **"Vocational Service Opportunities"**

Daily relations with business or professional associates can provide every Rotarian with opportunities to demonstrate personally to his customers, clients, suppliers, competitors, or colleagues that the ideal of Service can help form a truly solid basis upon which to achieve business and professional success.

Another way for a Rotarian to exert this kind of influence is through membership in a trade, business, or professional association. He should be actively involved not only at the local level, but, if feasible, at provincial, national, and international levels as well.

It is the responsibility of the club's trade and professional relations committee to aid these endeavors by asking Rotarians to report on their activities within their associations, by striving to improve standards of honesty and courtesy in the business and professions represented among the club's membership, and by mobilizing and coordinating the efforts of the club's members in these areas. One of the

most popular ways of doing so is by organizing programs generally known as business relations conferences.

Such a conference may be known by other names—"business clinic," "vocational service rally," "vocational seminar," "vocational assembly." It can embrace a broad spectrum of subjects, or it can be built about one theme chosen for its appeal and importance to the participants. It can be a small conference, such as the one organized by the Rotary Club of Ipoh, Malaysia, in which local businessmen studied the ethical aspects of their trade relations. Alternatively, it can be a large one, organized at the intercity, district, national, or international level, with panels of experts like those who took part in the vocational assemblies at Rotary's 75th Anniversary Convention in Chicago, Illinois, U.S.A. Topics covered included manufacturing, distribution and retailing, the service trades, education, law, and medicine. A good conference will allow experts and participants to face each other directly in discussion and debate. The program may be lightened with entertainment and fellowship.

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### **"The Case Study Discussion: An Effective Approach to Vocational Problems"**

Rotarians began by helping each other; in fact, they recorded the value of business conducted between members each week. The first Rotary club (Chicago, Illinois, U.S.A.) even had a business promotion committee, which in 1915 calculated that about US \$1,750,000 worth of business was exchanged between the club's 265 members! But members soon realized that more was to be gained by exchanging ideas for a different purpose—one that was on a higher plane. By sharing problems encountered in the workplace,

by discussing new business methods—in short, by confronting and sharing the real challenges of their daily occupations—Rotarians discovered the underlying principles and applications of Vocational Service.

This practice continues today in club programs that use the case study approach, which was first introduced as a tool in Rotary at the 1962 International Assembly.

The case study is, of course, nothing new. It had been used successfully for years as a way of instruction in adult management courses and in the highly respected Harvard School of Business in Massachusetts, U.S.A. Adapted to Rotary, it has become a means of gaining and sharing business experience and philosophy, and as such it is valuable to Rotarians in virtually all businesses and professions.

Such an approach involves group discussion of an actual problem that a member is confronting (or has confronted) in his job. The case is reported, discussed, and analyzed.

During the discussion, a discerning listener often comes to see somewhat more than he was able to see by himself, because each person involved in a case study group inevitably sees the case a little differently than do other participants. One consequence of this is that the sure-fire solution proposed by one man may look impractical to the others. If each member then tries to understand why the others think as they do, everyone is in a position to glean more from the discussion than if only one opinion had been considered.



\*Latent statistics can be obtained from the *R.I. News* or your copy of *The Rotarian*.



Rotary is an organization of business and professional men united worldwide, who provide humanitarian service, encourage high ethical standards in all vocations, and help build good will and peace in the world.

Others present were \_\_\_\_\_  
(others who are leaders in organizing the club)

The new Rotary club will reflect the spirit of friendship and concern for others which characterizes Rotary everywhere. Rotary's motto is "Service Above Self."

By selecting members from recognized businesses and professions in a community, a Rotary club becomes a cross-section of its business and professional life.

Regular weekly meetings of the Rotary club of \_\_\_\_\_  
(city/town)  
 will be held in \_\_\_\_\_  
(name of meeting place)

at \_\_\_\_\_  
(time and day). After formal admission to membership in Rotary International, its charter will be presented by \_\_\_\_\_  
(name/identification of district governor) at a special meeting attended by Rotarians from Rotary clubs in this area.

**Do continuation pages  
 of the release on separate  
 sheets.**

**SUPREME COURT OF THE UNITED STATES**

No. 86-421

Board of Directors of Rotary International, et al.,

*Appellants,*

v.

Rotary Club of Durte, et al.,

Appeal from the Court of Appeal of California, Second  
Appellate District.

Further consideration of the question of jurisdiction is  
postponed to the hearing of the case on the merits.

November 3, 1986

Justice Blackmun and Justice O'Connor took no part in the  
consideration or decision of this case.

No. 86-421

Supreme Court, U.S.  
**FILED**

DEC 18 1986

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

*Appellants,*

v.

ROTARY CLUB OF DUARTE, et al.,

*Appellees.*

**Appeal from the Court of Appeal  
of the State of California  
Second Appellate District**

**APPELLANTS' BRIEF**

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## QUESTIONS PRESENTED

This appeal presents the following questions under the United States Constitution:

Does the Unruh Civil Rights Act, Cal. Civ. Code § 51, construed by the California Court of Appeal to require the admission of females to all-male local Rotary clubs, unconstitutionally infringe the First Amendment associational rights of the members of such clubs, where there is an average membership of 46, selective membership requirements, an official and genuine policy of discouraging the the use of membership for commercial gain, and a principal purpose of promoting fellowship for the non-commercial and non-economic objectives of securing the voluntary, uncompensated participation of business and professional men in a variety of civic, eleemosynary and charitable service activities?

Is the Unruh Act, construed by the California Court of Appeal as applicable to such clubs, unconstitutionally vague and overbroad as an instrument for regulating memberships protected by First Amendment freedom of association?

## PARTIES

Appellants are Board of Directors of Rotary International and Rotary District 530. Appellees are Rotary Club of Duarte ("Duarte"), Mary Lou Elliott and Rosemary Freitag.<sup>1</sup>

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<sup>1</sup>In accordance with Supreme Court Rule 28.1 counsel states that Rotary International may be considered the "parent" of Rotary District 530, Rotary Club of Duarte, and all other Rotary Districts and local Rotary clubs.

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IN THE  
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OCTOBER TERM, 1986

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BOARD OF DIRECTORS OF ROTARY  
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v.

ROTARY CLUB OF DUARTE, et al.,

*Appellees.*

---

**Appeal from the Court of Appeal  
of the State of California  
Second Appellate District  
APPELLANTS' BRIEF**

---

**OPINIONS BELOW**

The Memorandum of Decision of the Superior Court of the State of California for the County of Los Angeles was issued on January 28, 1983. It is not reported but is printed as Appendix A to the Jurisdictional Statement. The Statement of Decision of that court was filed on March 21, 1983 and is also unreported but is printed as Appendix B to the Jurisdictional Statement. The opinion of the Court of Appeal was filed on March 17, 1986 and modified on April 9, 1986. It appears in 178 Cal. App. 3d 1051 (1986), and is

printed as Appendix C to the Jurisdictional Statement. The California Supreme Court issued its order denying appellants' petition for review on June 18, 1986. Said order is printed as Appendix D to the Jurisdictional Statement.

### JURISDICTIONAL GROUNDS

The Notice of Appeal was filed in the Court of Appeal on July 15, 1986. A copy thereof is printed as Appendix E to the Jurisdictional Statement. The time within which to docket this appeal expired on September 16, 1986, and timely docketing was made. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and 28 U.S.C. §2101(c). Appellants squarely challenged the constitutionality of the Unruh Act, if construed to require the admission of females to local Rotary clubs, and the California Court of Appeal squarely sustained its validity, as so construed. The California Supreme Court declined to review the decision of the Court of Appeal. Jurisdiction under 28 U.S.C. §1257(2) is supported by the decisions in *Orr v. Orr*, 440 U.S. 268 (1979) and *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

We have held consistently that a state statute is sustained within the meaning of §1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds. [441 U.S. 434, 441]

Appellees, in their Motion to Dismiss or Affirm, incorrectly asserted that appellants did not draw in question the validity of the Unruh Act on the ground of its being repugnant to the Constitution of the United States as

required by Section 1257(2).<sup>2</sup> The trial court clearly understood appellants' contention that application of the Unruh Act to local Rotary clubs would make the statute void under the federal Constitution, and agreed with it:

. . . to require Rotary International *pursuant to the Unruh Act* to offer its membership to women (as well as to the entire public indiscriminately) would inflict severe, irreparable, and unconscionable harm upon Rotary and the associational rights of its members without commensurate or any substantial resulting economic benefit to women or the public.

• • •

Where, as here, there is no persuasive proof that exclusion from membership in the purely private organizations comprising Rotary has imposed a material or substantial economic constraint upon any woman, it would be a violation of the defendants' rights to liberty of association *under the United States Constitution* for the California Courts or Legislature to require the defendant organizations to accept women in contradiction of the male only membership restrictions which have frequently and recently been reaffirmed democratically by the members of Rotary. . . . [J.S. App. B-9, B-13] [emphasis added]

---

<sup>2</sup>Although appellants filed a brief in opposition for the specific purpose of rebutting appellees' statements in this respect, that brief was filed October 30 and was possibly not considered by the Court before it issued its order on November 3, postponing consideration of jurisdiction to the hearing on the merits. Consequently, the question of jurisdiction is addressed again in accordance with Rule 16.8.



The Court of Appeal held the Unruh Act applicable to Rotary and rejected Rotary's contention that such application would be invalid:

International argues that forcing it to excuse compliance with the male-only-membership policy would violate the associational freedoms afforded it by the federal Constitution.

• • •

We therefore conclude that application of the Unruh Act to International does not abridge its freedom of intimate or expressive association. [J.S. App. C-33, C-38]

Petitioning the Supreme Court of California for review, appellants again raised the issue:

Did the Court of Appeal's application of the Unruh Act abridge the First Amendment freedom of association privileges appurtenant to the membership policies of Rotary International and its local California club? [Petition for Review at 2.]

The Supreme Court denied the petition, leaving intact the Court of Appeal's decision. Thus, the constitutionality of the Unruh Act was drawn in question from the inception of this case; the trial court construed it as inapplicable, avoiding the need to hold it unconstitutional. The Court of Appeal, however, met the challenge head-on and held that the Act applied to appellants and was constitutional nevertheless. Jurisdiction clearly lies under 28 U.S.C. § 1257(2).

Where it appears from the opinion of the state court of last resort that a state statute was drawn in question as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire into how and when the question of the validity of the statute was

raised when such question appears to have been actually considered and decided by that court. [*Charleston Federal Savings and Loan Association v. Alderson*, 324 U.S. 182, 185-186 (1945)]

Even if this were not so, however, it is clear that this is a case where appellants claimed the constitutional right of freedom of association and such claim was denied by the Court of Appeal. As appellees recognize, in such cases a petition for certiorari under 28 U.S.C. § 1257(3) is appropriate, and this Court may treat the jurisdictional statement as a petition for writ of certiorari. *Local 926, International Union of Operating Engineers*, 460 U.S. 669 (1983); *Palmore v. U.S.*, 411 U.S. 389 (1973). For the reasons set forth at length in appellants' jurisdictional statement, this case should be heard by the Court on the merits so that vitally important issues of national significance can be resolved, whether on appeal or by the grant of a writ of certiorari.

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the constitutionality of the California Unruh Civil Rights Act under the First and Fourteenth Amendments to the United States Constitution. [J.S. App. H]

The Unruh Act, Cal. Civ. Code § 51, provides in pertinent part:

All persons within the jurisdiction of this State are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

In addition, the pertinent provisions of California Civil Code § 52 are as follows:

Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of sex, color, race, religion, ancestry, or national origin contrary to the provisions of Section 51 . . . is liable for each and every such offense for the actual damages, and such amount as may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than two hundred fifty dollars (\$250), and such attorney's fees as may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51 . . .

## STATEMENT OF THE CASE

### Facts

In the instant case, the trial court made findings of fact, supported by substantial evidence, which clearly distinguish local Rotary clubs from the Jaycees. The California Court of Appeal, without disagreeing with most of the trial court's specific findings, nevertheless disagreed with its conclusions of ultimate fact and held that local Rotary clubs are business establishments within the meaning of that term in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and that "A similar conclusion is mandated in this case." [J. S. App. C-37].<sup>3</sup>

---

<sup>3</sup>Since First Amendment rights are implicated, this Court will make an independent review of the facts found by the California courts. *In re Primus*, 436 U.S. 412, 434 (1978). To assist in this review, the evidence is discussed at some length. A discussion of California law regarding the precedence which findings of a trial court should be given over contrary resolutions of conflicting evidence appears at page 9, n.4, of the Jurisdictional Statement.

Rotary is a worldwide association of local Rotary clubs. In August, 1982 there were 19,788 local clubs in 157 different countries with a total membership of approximately 907,750. Thus, the average membership of a local club was 46. An individual Rotarian is a member of a local club, not of Rotary International; all local clubs are members of Rotary International. [J. S. App. C-4 - C-5; Rotary Basic Library, Focus on Rotary, vol. 1, p. 1]. Each club is co-equal with every other club, and each club, when it joins, agrees to abide by the rules contained in the standard Rotary club constitution, which it adopts upon admission, as well as the constitution and by-laws of Rotary International. [Pigman deposition, J. S. App. G-12; J. S. App. C-6 - C-7].

Membership is restricted to males. [J. S. App. B-5, C-6]. Rotary does not permit the use of its name by women's clubs, nor may such clubs become members of Rotary International and participate in its conventions and other forms of administration. [1981 Manual of Procedure, pp. 155-156].

Membership in Rotary is by invitation only. [Rotary Basic Library, Focus on Rotary, vol. 1, pp. 1-2; Pigman deposition, J. S. App. G-49].

Rotary utilizes a "classification principle" which, with certain exceptions, limits the number of members from each classification of business or profession within the community that can be admitted into active membership in a local Rotary club. [J. S. App. B-4, C-6; Rotary Basic Library, Focus on Rotary, vol. 1, pp. 2, 67, Club Service, vol. 2, p. 7; Pigman deposition, J. S. App. G-49].

Rotary International has adopted Recommended Club By-Laws for local clubs which set forth the procedure for admission of new members. The name of a candidate for

admission must be proposed to the local club by the membership committee or by an active, senior active, or past service member. The sponsor submits the candidate's name to the club's board of directors on a membership proposal card. The board sends the card to the classifications committee and the membership committee. The former makes sure that there is an open classification of business or profession and that the prospective member's business or profession is accurately described by that classification. The latter evaluates the candidate from the standpoint of character, business and social standing, and general eligibility. To avoid embarrassment, the candidate's name is kept confidential throughout this preliminary procedure and the candidate himself is not told of these investigations.

If the reports of both committees are favorable and the board approves them, the candidate's name, business and classification are published to the members. If there is no written objection received by the board within 10 days, the candidate becomes a member. If there is such an objection, membership requires a further approving vote by the board. [Rotary Basic Library, Club Service, vol. 2, pp. 29-32].

An active member of a local Rotary club must work in a leadership capacity (owner, partner, manager, *et al.*) in the business or profession in which he is classified. [J. S. App. C-6, n. 4; Rotary Basic Library, Club Service, vol. 2, p. 32; Pigman deposition, J. S. App. G-56]. A retired man cannot become an active member, since he is not engaged in a business or profession. [Rotary Basic Library, Club Service, vol. 2, p. 15].

Membership in Rotary is always personal; it does not represent a company membership. [Pigman deposition, J. S. App. G-16]. Each local Rotary club seeks its members from the business and professional leaders within a clearly defined



geographical community approximating a single municipality in size. There is generally only one local Rotary club in any given geographical community. [J. S. App. B-2; 1981 Manual of Procedure, p. 205]. An active member must live or work within the club's territory. [J. S. App. C-6, n. 4; Rotary Basic Library, Club Service, vol. 2, p. 32]. There is no provision by which a member of a Rotary club may transfer his membership from one club to another. [1981 Manual of Procedure, p. 135].

The foregoing undisputed facts led the trial court to find that Rotary clubs are highly selective in their membership, and that such membership "is neither solicited from nor is it available to the public generally." [J. S. App. B-4, B-5]. The Court of Appeal agreed that "the membership criteria set forth by International and by which the local clubs must abide is selective. . . ." [J. S. App. C-35].

Another important aspect of Rotary club membership, in addition to its selectivity, is that governance is in the hands of the members. Each local club is governed by a board of directors elected by the membership. [Rotary Basic Library, Focus on Rotary, vol. 1, p. 70]. Rotary's Council on Legislation, which is the mechanism by which any local Rotary club may propose changes to the constitution, is comprised of representatives of the clubs in all Rotary districts. It meets every three years, and delegates are democratically elected by mail ballot or at a district conference. [Pigman deposition, J. S. App. G-13].

The object of Rotary is to encourage and foster the ideal of service as a basis of worthy enterprise and, in particular, to encourage and foster:

First: The development of acquaintance as an opportunity for service. [1981 Manual of Procedure, p. 160].



The General Secretary of Rotary International, Herbert Pigman, testified that fellowship and the camaraderie and ease of relationships that develop among a group of men who meet weekly is an important component of their effectiveness in rendering service. [Pigman deposition, J. S. App. G-44]. To ensure that the undivided interest and energy of Rotarians are addressed to Rotary's membership obligations, Rotarians are urged not to belong to other service clubs. [1981 Manual of Procedure, p. 135].

Rotary meetings are not open to the public, and the local Rotary club "is intended to be really a *club* — a body of men who are knit together in bonds of personal friendship and service." [Pigman deposition, J. S. App. G-25; Rotary Basic Library, Focus on Rotary, vol. 1, pp. 67-68] [emphasis in original]. Joint meetings with other service clubs are discouraged. [1981 Manual of Procedure, pp. 155-156].

Based on the above facts, the trial court found that the importance of associational congeniality among Rotarians is substantial. [J. S. App. B-3]. The Court of Appeal agreed that "fellowship and service to the community play a very important part in the Rotary organization . . ." [J. S. App. C-35 - C-36].

Rotary's male-only policy originated many years ago. As Rotary grew nationally and internationally, the policy grew into a fundamental and broadly accepted principle of Rotarian operation, cherished both for the quality of fellowship and camaraderie which it provided, and also to a material extent because of the demonstrated fact that, as a male-only organization, Rotary has been able to operate effectively over a worldwide base of varied cultures and social mores. [Pigman deposition, J. S. App. G-50 - G-53].

A vote of two-thirds of the members of the Council on Legislation is required to approve an amendment to the

Rotary constitution. Proposals to change the male-only rule were defeated in 1972, 1977 and 1980. In 1980, the proposed amendment was debated for three hours and obtained the favorable vote of only 40% of the delegates. [Pigman deposition, J. S. App. G-41 - G-42]. Indeed, Duarte's expulsion for violation of the rule was approved by the 1978 annual convention by a vote of 1060-34. [Clerk's transcript 217 FFF].

The trial court found that the issue of the compelled admission of women into local Rotary clubs "is of widespread and deep concern among Rotarians both in the United States and in widely different cultures throughout the world," and that "the continued successful worldwide operation of Rotary is materially dependent on a delicate balance of divergent attitudes in diverse cultures. . . ." [J. S. App. B-6 - B-7]. The Court of Appeal agreed that "the male-only-membership policy is valued by a substantial majority of Rotarians throughout the world and that, as a rule that has been internally agreed upon, it has enabled the organization to work effectively on a worldwide basis. . . ." [J. S. App. C-30].

Finally, while it is true that in the early days of Rotary, there was a motivation of business advantage to membership, this consideration was soon abandoned in favor of the concept of "Service Above Self." [Pigman deposition, J. S. App. G-34 - G-35; Rotary Basic Library, Focus on Rotary, vol. 1, p. 2]. The 1981 Manual of Procedure specifically provides: "Any use of the fellowship of Rotary as a means of gaining an advantage or profit is foreign to the spirit of Rotary." [1981 Manual of Procedure, p. 154]. This policy dates from at least as early as 1934. [Pigman deposition, J. S. App. G-36]. The rules of Rotary in this particular respect "are jealously guarded by the general body of its members." [Rotary Basic Library, Focus on Rotary, vol. 1, pp. 2, 60].

In addition, the official Rotary directory contains a prohibition against using it or making it available for use as a commercial mailing list. [Pigman deposition, J. S. App. G-62].

The trial court was thus able to find that "For many years the official and genuine policy of Rotary International has been to discourage the seeking or giving of preferential business custom among Rotarians or the use of Rotarian membership for commercial gain." [J. S. App. B-3]. The trial court also found that "Rotary has for many years consciously, genuinely, and effectively abandoned use of the 'classification' system as a device for encouraging professional business relationships among Rotarians." [J. S. App. B-4].

#### What Led to This Appeal

In 1977 Duarte admitted Donna Bogart, Mary Lou Elliott and Rosemary Freitag as active regular members in contravention of the constitution and by-laws of Rotary International. [J. S. App. C-7]. After full compliance with its notice and hearing requirements, Rotary International, acting through its Board of Directors, revoked Duarte's charter and terminated its membership. [J. S. App. C-8]. On January 8, 1979, Duarte and two of the three women, Elliott and Freitag, filed an amended complaint for injunctive and declaratory relief against the Board of Directors of Rotary International, Rotary District 530 and the district governors of District 530 for the fiscal years 1977-1978 and 1978-1979. The two individual defendants were later dismissed.

In their amended complaint, plaintiffs sought (1) to enjoin the defendants from declaring Duarte's charter null and void, from compelling delivery of the charter to any

representative of Rotary International, and from enforcing those provisions of Rotary International's constitution and by-laws restricting membership in local clubs to males and (2) a declaration that the acts of defendants violated the Unruh Act.<sup>4</sup>

The matter was tried before the trial court without a jury, defendants asserting, among other defenses, that, if the Unruh Act required local Rotary clubs to admit females, it would violate their associational rights under the First and Fourteenth Amendments to the United States Constitution. The trial court entered judgment in favor of defendants, finding that Duarte, Rotary International and District 530 were not "business establishments" within the meaning of the Unruh Act, and that they were not organizations providing "goods, services and facilities" to their members. It further found that to preclude enforcement of Rotary's male-only policy would unconstitutionally infringe the associational rights of many Rotarians and "would materially affect the operation of Rotary not merely outside the State of California but outside the United States." The trial court also found that plaintiffs had not proven that enforcement of the male-only policy and expulsion of Duarte from Rotary International had caused any damage to Duarte or to the individual plaintiffs or women in general.

The Court of Appeal reversed, finding that both Duarte and Rotary International were business establishments within the meaning of the Unruh Act. The Court of Appeal held that, as business establishments, Duarte and Rotary

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<sup>4</sup> Plaintiffs also alleged a violation of Article 1, section 8 of the California Constitution. The trial court held that this constitutional provision requires state action and was inapplicable. The Court of Appeal did not rule on this issue.

International were guilty of "arbitrary" sex discrimination, and that to enforce the Unruh Act against them did not violate the First and Fourteenth Amendments. It ordered reinstatement of Duarte as a member of Rotary International and a permanent injunction against enforcement of the male-only membership restriction. The California Supreme Court denied a petition to review the decision of the Court of Appeal.

## SUMMARY OF ARGUMENT

### **The heart of the case**

This is an extremely significant case involving individual rights under the United States Constitution. It is *not*, however, a case which involves the rights of women under that Constitution, nor is it, properly viewed, a case which involves the rights of women at all. The rights of women and of men, *per se*, are not involved. What is involved is the right of an individual, of either sex, to join with other persons of his or her own choosing for purposes of fellowship and service to society.

The California Court of Appeal has ruled that a local Rotary club, made up of a group of males who have joined together in a selective manner for such purposes, may be compelled, under the Unruh Act, to admit women because admission to membership may afford economic or other benefits to such women. If this decision is upheld on appeal, no group of individuals, no matter how selective their membership criteria, may exclude from membership females or any other class of person, where such benefits flow from membership. This, of course, will be true in every case. The well-established and vitally important First Amendment right of freedom of association will have been destroyed by a well-meaning but overly intrusive state policy expressed in a vague and overly broad statute.



In the recent case of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court held that an *unselective* organization of men engaged in the *public sale of memberships* which made available to members *services otherwise commercially available* was not entitled to constitutional protection against the application of a similar, but narrower, statute. The reasoning of the Court expressed there, as well as a long line of cases defining First Amendment rights, compels a decision here reversing the Court of Appeal.

### **Freedom of intimate association**

In *Roberts*, this Court reaffirmed the basic principle that associations "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship," "reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." Factors held to be relevant "include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." [468 U.S. at 620]

Local Rotary clubs are generally small in size; their purpose is the rendition of voluntary service; their policies specifically prohibit their use for personal aggrandizement; they have selective membership admission policies; camaraderie and fellowship are extremely important aspects of membership; and they are governed by popularly elected boards of directors. The relevant tests set forth in *Roberts* are fully met, and such clubs and their members are entitled to freedom of intimate association. The Constitution imposes a controlling restraint on the State's power to regulate the selection of club members.



### Freedom of expressive association

Additionally, local Rotary clubs are entitled to protection of their freedom of expressive association. As both Justice Brennan's majority opinion and Justice O'Connor's concurring opinion in *Roberts* recognize, "civic" and "charitable" activities, as well as "participation in community service" constitute expressive activities entitled to First Amendment protection. While it is clear that the right to associate for expressive purposes is not absolute, any abridgement of the right must be justified by a compelling state interest, and must be no broader than required to accomplish such compelling goals. Local Rotary clubs are not "engaged in acts of invidious discrimination in the distribution of publicly available goods, services and other advantages." [468 U.S. at 628] The very selectivity in membership which is an important factor in sustaining their right to freedom of intimate association demonstrates that state concerns "with respect to gender discrimination in the allocation of publicly available goods and services" are not implicated here. [468 U.S. at 609]

Moreover, the "continued successful worldwide operation of Rotary is materially dependent on a delicate balance of divergent attitudes in diverse cultures, . . . and judicial interference with this balance . . . would risk a material and harmful disruption of the cooperative integrity of Rotary International both inside and outside the State of California. [J.S. App. B-6—B-7; Pigman deposition, J.S. App. G-46—G-53] Under such circumstances, to require local Rotary clubs to admit women as full voting members would constitute an infringement of associational rights far exceeding any state interest.

### **Vagueness and overbreadth**

Finally, independent of the fact that applying the Unruh Act to local Rotary clubs unconstitutionally infringes substantive rights to freedom of association, that Act, as it has been construed by California courts, is both unconstitutionally vague and overbroad. It prohibits any form of "arbitrary" discrimination, and imposes significant penalties upon violators. What is "arbitrary" to one may be well-reasoned and principled to another. In California, a decision which is both "rational" and "taken in 'good faith'" may nevertheless be "arbitrary." *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 89 n. 19, 707 P.2d 212 (1985).

In addition, the statute has been held to apply to any entity with "sufficient businesslike attributes." It has been held to apply to such disparate entities as a nonprofit condominium owners' association, the Boy Scouts, a Boys' Club, and local Rotary clubs. Under such a statute a person of common intelligence must necessarily guess at the meaning and application of the law. The Unruh Act fails to meet the first essential of due process.

Furthermore, in reaching any act of arbitrary discrimination engaged in by a commercial or noncommercial entity with businesslike attributes, the Unruh Act extends its scope far beyond any compelling state interest in prohibiting discrimination in the course of furnishing goods, services or facilities to clients, patrons or customers. The Constitution does not permit such limitless intrusion upon protected First Amendment rights.

## ARGUMENT

## I

Rotary clubs are selective in their membership, are governed by their members, have well-defined policies restricting participation to members, and are clubs in which fellowship in service to the public is of prime importance; they and their members are entitled to protection of their freedom of intimate association.

Since the decision of this Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), there can be no question as to whether or not the First Amendment guarantees to an individual the right to freedom of association.

... the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as an element of personal liberty.

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Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safe-

guards the ability independently to define one's identity that is central to any concept of liberty. [468 U.S. at 617-719] [citations omitted]

In *Gilmore v. City of Montgomery, Alabama*, 417 U.S. 556 (1974), cited in *Roberts* in support of the foregoing principles, Justice Blackmun, in part quoting Justice Douglas, put it succinctly:

'Government may not tell a man or woman who his associates must be. The individual can be as selective as he desires.' The freedom to associate applies to the beliefs we share and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change. [417 U.S. at 575] [citation omitted]

The philosophical underpinnings for freedom of association may be traced to DeTocqueville, who viewed it as so fundamental as to have a source in natural law:

The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore, the right of association seems to me by nature almost as inalienable as individual liberty. [DeTocqueville, *Democracy in America*, at 178 [G. Lawrence trans. 1966)]

Professor Kauper has noted that the right to associate includes the right not to accept unwanted members. [P. Kauper, *Civil Liberties and the Constitution* 104-106 (1962)] In *Roberts*, this Court agreed:

Freedom of association therefore plainly presupposes a freedom not to associate. [468 U.S. at 623]

Despite these accepted principles, however, the Court held that the Jaycees could constitutionally be compelled to admit women despite their desire to restrict membership to

males. As the Court quite properly noted, "an association lacking [peculiarly personal] qualities — such as a large business enterprise — seems remote from the concerns giving rise to this constitutional protection." [468 U.S. at 620]

Justice Brennan, while declining to map the terrain between constitutionally protected intimate association and "the most attenuated of personal relationships," cited Justice Powell's concurring opinion in *Runyon v. McCray*, 427 U.S. 160 (1976), and noted that the factors to be considered "include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." [468 U.S. at 620] Justice Powell had earlier stated that relationships "that are 'private' in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted . . ." [427 U.S. at 189] Rotary clubs meet Justice Brennan's tests; local Jaycees chapters did not.

The local chapters of the Jaycees were "large and basically unselective groups." [468 U.S. at 621] Furthermore, women affiliated with the Jaycees attended meetings, participated in projects, and engaged in many of the organization's social functions. Indeed, nonmembers of both genders regularly participated in activities "central to the decision of many members to associate with one another." [468 U.S. at 621] Therefore, the Jaycees lacked the "distinctive characteristics" which could "afford constitutional protection to the decision of its members to exclude women." [468 U.S. at 621]

In *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981), the Minnesota Supreme Court had earlier held that the Jaycees could not properly exclude women



from membership because it was a "public" as opposed to a "private" organization, such as Kiwanis International.

Judge Lay, dissenting in *United States Jaycees v. McClure*, 709 F.2d 1560 (8th Cir. 1983), agreed with the Minnesota court's analysis:

The Minnesota court denotes as one criterion for the public-private distinction the use of standards in selecting new members and a formal procedure by which membership is restricted. The membership of the Kiwanis group is limited so that the number of members in any one given occupational classification cannot exceed 20% of the total active membership. Such a restriction circumscribes membership boundaries and would serve in itself to make the Kiwanis "private," unlike the Jaycees which has no limiting requirements except for age and sex. [709 F.2d at 1582]

In *Roberts*, the validity of this distinction was approved:

Like the dissenting judge in the Court of Appeals, however, we read the illustrative reference to the Kiwanis Club, *which the record indicates has a formal procedure for choosing members on the basis of specific and selective criteria*, as simply providing a further refinement of the standards used to determine whether the organization is "public" or "private." [468 U.S. at 630] [emphasis added]

In the instant case, the undisputed evidence is that local Rotary clubs on average have only 46 members. Prior to its admission of women in 1977, Duarte's membership had at times fallen below 20 members. [Stipulation, J.S. App. F-3.] Membership criteria are more selective than those of Kiwanis, strict admission policies are adhered to, and fellowship in service is the principal purpose of Rotary. Members may not freely transfer membership from one club to another. Governance of the clubs is in the members.



Rotary club meetings are not open to the public, nor are joint meetings with other service clubs approved. Not only are women not admitted to membership; there are no official women's affiliates entitled to use the Rotary name or participate in the activities of Rotary International. Rotary's male-only membership is prized both because it enhances the fellowship which is at the heart of Rotary, and because it enables Rotary to operate effectively throughout a world of varied cultures and mores. These facts, none of which is in dispute, clearly place local Rotary clubs on the opposite side of the line from the Jaycees.

The trial court's findings of fact, which led it to the conclusion that Rotary is quite unlike the Jaycees, while there is "substantial similarity between Rotary and Kiwanis" were never directly contradicted by the Court of Appeal. Rather, that court stressed the large number of local Rotary clubs which make up Rotary International and held that "membership in International" is far from "continuous, personal and social." [J.S. App. C-27] Appellees, in their Motion to Dismiss or Affirm, also focus on the total membership of all Rotary clubs. [Motion, pp. 14-15] Some discussion of this point is required.

The constitutional right to freedom of association belongs in the first instance to an individual. In protecting such right, his or her membership in a specified "club," "group," or "organization" must be protected. In the instant case, the constitutional issue is whether a local Rotary club can, under the Unruh Act, constitutionally be compelled to open its membership to women. Rotary International, as such, has no individual members. Rotary International is an association of local Rotary clubs which, through democratically elected representatives, has chosen to require that all local clubs wishing to call themselves "Rotary" must abide by the same rules. One of those rules is the male-only

membership rule. When the California Court of Appeal held that such rule cannot be enforced in the case of Duarte, because to do so would constitute arbitrary discrimination, the effect of such decision was to invalidate the rule for all California Rotary clubs. It is the constitutional right of the members of a local Rotary club to exclude women that is to be decided here, and it is the facts concerning such local clubs that are significant here, just as it was the facts concerning the "local chapters of the Jaycees" which doomed their plea for constitutional protection. At the local club level, there can be no question but that the factors of "size, purpose, policies, selectivity, congeniality" stressed by the Court in *Roberts* clearly indicate that sufficient "distinctive characteristics" exist to entitle such clubs to constitutional protection of their membership policies.<sup>5</sup>

When the California Court of Appeal turned its attention to the characteristics of the local clubs, its most significant comment was that "the community services performed by local Rotarians clearly take place in 'public view.'" It also stated that "While there is personal and social interaction among Rotarians, the commercial aspects of the relationship clearly preclude a conclusion that they are 'truly private.'" [J. S. App. C-28]. The absence of significant commercial aspects to Rotarian membership is discussed in detail hereafter.<sup>6</sup>

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<sup>5</sup>Cf. *Kiwanis International v. Ridgewood Kiwanis Club*, Nos. 86-5199 and 86-5278 (3d Cir. December 3, 1986) (Third Circuit focused on characteristics of the local club, not the international organization).

<sup>6</sup>The court misread *Roberts* in this regard. Commercial distribution of publicly available goods and services may affect an organization's right to freedom of expressive asso-

With respect to the fact that Rotarians do not perform their public services in secret, the words of the New York Court of Appeals in *Kiwanis Club of Great Neck v. Board of Trustees of Kiwanis International*, 41 N.Y. 2d 1034 (1977), should be borne in mind:

Although the Kiwanis Clubs' community-oriented activities may extend into the public sphere, the intrusion indicated on this record is not so extensive, *or of the quality*, as to permit governmental supervision of essentially private activity in the constitutional sense. [41 N.Y. 2d at 1034] [emphasis added]

The California Court of Appeal simply failed to grasp the vital difference between closely-knit members of a private organization rendering public service out of a sense of dedication and the sale of services to the public by a public business. [See Pigman deposition, App. G-26 - G-27, G-33 - G-34, G-45].

Additional guidance, if any were needed, may be obtained from a review of the "private club" exemption under the Civil Rights Act of 1964, 42 U.S.C. § 2000a, *et seq.*, which, in reliance upon the Thirteenth Amendment, prohibits racial discrimination. No similar amendment and no similar federal statute supports the rights of appellees. Nevertheless, analogies may be drawn between organizations entitled to exemption under the federal law and those entitled to constitutional protection against a comparable state statute.

Perhaps the most famous decision interpreting the "private club" exemption is that of the three-judge court in

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ciation. The mere presence of business benefits in a selective private association, however, does not cause the members to lose their right to freedom of intimate association. See discussion *infra* at 28-33.

*Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974). The court, reviewing a large number of cases, set forth the factors to be considered to determine whether an organization is a "private club." These were (a) the selectiveness of the group in the admission of members, (b) the existence of formal membership procedures, (c) the degree of membership control over internal governance, particularly with regard to new members, (d) the history of the organization, *i.e.*, was it created or insubstantially modified to avoid civil rights legislation, *i.e.*, is it a sham, (e) the use of club facilities by non-members, (f) the substantiality of dues, (g) whether the organization advertises, and (h) the predominance of the profit motive. The court stressed that the most important factor, embodied in the first three variables, is membership practices. In the instant case, local Rotary clubs are selective in the admission of members; they operate in accordance with formal membership procedures; and admission is by vote of the members. As the Elks, in *Cornelius*, were protected from the reach of federal civil rights acts in excluding blacks from membership, local Rotary clubs are entitled to First Amendment protection from the reach of the Unruh Act and other like state laws. As Justice Rehnquist, speaking for the Court in *Moose Lodge No. 107 v. Iris*, 407 U.S. 163 (1972), might well have said:

[The local Rotary club] is a private club in the ordinary meaning of that term. It is a local chapter of a national fraternal organization having well-defined requirements for membership. [407 U.S. at 171]

The importance of preserving the rights of the members of such organizations has been recognized by commentators who agree with the result in *Roberts* but would not wish it extended to selective, private membership organizations.

When the last all-women's private school is forced to close its doors, when the law no longer tolerates the existence of all-Norwegian or all-Catholic clubs, when the Boy Scouts and the Girl Scouts finally merge, even those calling themselves egalitarians may stop to shed a tear or two for pluralism lost.

It is important to realize that nothing strikes closer to the heart of American pluralism than a law which tells an association who it must accept as a member. The power to change the membership of an association is "the power to change its purpose, its programs, its ideology, and its collective voice." It is a power so dangerous that it should not be exercised even in many situations where it is believed that discrimination practiced by an association is wrong. [Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 Mich. L.R. 1878, 1902 (1984)]

Local Rotary clubs and their members are fully entitled to claim the benefits of First Amendment protection for their right to freedom of intimate association.

## II

**Rotary clubs are not engaged in the commercial distribution of publicly available goods and services; elimination of their democratically reaffirmed male-only membership policy would cause severe and irreparable harm; no compelling state interest justifies interference with their freedom of expressive association.**

In addition to the freedom to restrict membership in constitutionally protected private associations which consti-



tutes an "element of personal liberty," the Court, in *Roberts*, also noted:

... we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. [468 U.S. at 622]

Even though the Jaycees lacked the distinctive characteristics of size and selectivity which might have entitled the organization to the first type of associational freedom, the Court recognized that "civic, charitable, lobbying, fundraising" activities carried on by the Jaycees are "worthy of constitutional protection under the First Amendment." [468 U.S. at 627.] Justice O'Connor, concurring, noted that:

Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement. [468 U.S. at 636]

Justice O'Connor turned for illustrations to the Girl Scouts and the Boy Scouts and their handbooks. She might well have cited the objects of Rotary.

Freedom of expressive association extends, not just to organizations also entitled to freedom of intimate association, but to any organization which possesses genuine expressive associational purposes and the need for such protection. Thus, the NAACP, with membership criteria far less selective than those of Rotary, has time and again been held entitled to protection for its objectives, *i.e.*, "... to advance the interests of colored persons ... and to increase their opportunities for ... employment." *NAACP v. Alabama, ex rel., Patterson*, 357 U.S. 449, 451 (1958). Indeed, advancement of the economic interests of its members is



sufficient to afford an associational group First Amendment protection. *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

As Justice Douglas, who perhaps wrote more opinions on the subject than any other Justice, put it:

The right of "association," like the right of belief . . . is more than the right to attend a meeting; *it includes the right to express one's attitude or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression*; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful. [*Griswold v. Connecticut*, 381 U.S. 479, 483 (1965)] [emphasis added]

In *Roberts*, this Court upheld a Minnesota statute "eliminating discrimination and assuring its citizens equal access to publicly available goods and services," as applied to the Jaycees. In reaching this conclusion, the Court was governed by its finding that the Jaycees organization was engaged in offering "goods," "privileges" and "advantages" to the general public, but excluding women. The Minnesota Supreme Court had held that "The product being sold is membership in an organization whose aim is the advancement of its members." *United States Jaycees v. McClure*, 305 N.W.2d 764, 769 (1981)

This Court accepted the findings of the Minnesota court and held:

. . . acts of invidious discrimination in the distribution of *publicly available* goods, services, and other advantages cause *unique evils* that government has a compel-

ling interest to prevent — wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce *special harms distinct from their communicative impact*, such practices are entitled to no constitutional protection. [468 U.S. at 628] [emphasis added]

The differences between Rotary and the Jaycees in this regard are significant and controlling. The Jaycees was a public commercial organization with incidental associational activities. Rotary is not. The trial court found that Rotary is not “an organization engaged in providing goods, services, and facilities to its members as clients, patrons, or customers.” [J.S. App. B-9] Rotary membership “is neither solicited from nor is it available to the public generally.” [J.S. App. B-5] Its business benefits are “incidental to the principal purposes of the association which are to promote fellowship for *non-commercial* and *non-economic* objectives and to secure the voluntary uncompensated participation of business and professional men in the aforesaid ‘service’ activities.” [J.S. App. B-3] [emphasis in original] Rotary members do not sell services or purchase services through membership; they render service *pro bono publico*. [Pigman deposition, J.S. App. G-26 — G-27, G-33 — G-34, G-45]

The Court of Appeal did not directly address the constitutional requirement that an organization otherwise entitled to First Amendment protection must be engaged in discriminatory distribution of publicly available goods, services and other advantages for the state’s interest in preventing such discrimination to become sufficiently compelling to justify abridgement of the organization’s rights. Rather, it merely determined that both local Rotary clubs and Rotary International were “business establishments” within the meaning of the Unruh Act. With respect to Rotary Interna-

tional, the court focussed on "businesslike" organizational structure, its financial operations and its publication of an official directory. [J.S. App. C-16—C-22] As to the local clubs, the Court of Appeal accepted as factual that "[t]oday, official policy promulgated by International through its Board 'specifically prohibits any attempt to use the privilege of membership for commercial advantage.'" Nevertheless, it held that "[s]ubstantial business benefits regardless of whether they are of a primary or secondary concern must be considered," and asserted that "the evidence establishes that there are business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers," [J.S. App. C-23, C-24, C-26] In support of its conclusion, the Court cited the testimony of four Rotarians that they "felt" or "believed" that they would obtain business benefits by belonging to Duarte or another local Rotary club and that they either deducted their dues for federal income tax purposes or had them paid by their employers. No evidence was presented of *any* specific benefits obtained by any of these individuals or their employers. The fact that the General Secretary of Rotary International was required to belong to a local Rotary club and that he deducted his dues as a business expense is, of course, irrelevant.

The Court of Appeal did not refer to the admission of the two female plaintiffs "that they did not join the Duarte Club for the express purpose of promoting their business or professional careers," and "that they did not feel that they had been impeded in the pursuit of their business and/or professional careers or financially damaged by any actions of Rotary International." [Stipulation, J.S. App. F-4]

More important, however, is the undenied and undeniable fact that Rotary policy explicitly prohibits use of membership for the financial or business advancement of members. Justice Stevens elegantly expressed the control-

ling principle when, speaking for the Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), he held that unauthorized improper acts by a few members of an organization contrary to its policy do not entitle the government to infringe the First Amendment rights of the group.

A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees. [458 U.S. at 934]

In *Kiwanis Club of Great Neck v. Board of Trustees of Kiwanis International*, 374 N.Y.S.2d 265 (1975), *aff'd*, 41 N.Y.2d 1034 (1977), plaintiffs contended that Kiwanis was largely a business organization, with valuable commercial contacts made through membership, and that women were put on an unequal footing in the business community by being unable to join. Evidence was presented that members stated their name, occupation or profession and firm name at the beginning of each meeting, that employers paid the dues for their employees, and that some members had developed substantial business through contacts made by means of membership. The trial court, after reviewing the objects of Kiwanis as set forth in its constitution, concluded that "[t]heir declared objectives certainly cannot be construed, on their face, as having any commercial implications." [374 N.Y.S.2d at 267] The court then went on to say:

The fact that individual members may use their membership in a club to further their own business interests does not, in any way, change the avowed purposes of the organization, or convert it into a commercial club. There can be no doubt that membership in a golf club, for example, may be used by some members to promote business connections and that certain employers of such members might even pay their dues. It is also

conceivable that there are some who join a charitable or religious organization and become active therein, because of selfish or commercial benefits. Should the activities of some individual members be sufficient to convert such organization itself into a commercial enterprise? [374 N.Y.S.2d at 268]

The court did not discuss whether or not Kiwanis had an explicit policy against commercialization, but it is clear that Rotary does. If the testimony of dissident members of a private club that, despite an official policy to the contrary, they had motives of commercial self-aggrandizement in joining, were sufficient to destroy the protected freedom of association of the rest, no club would be safe from attack. The trial court here correctly noted that the female plaintiffs in this case "would have the Court nullify existing membership restrictions so that women could further violate Rotarian precepts by seeking commercial exploitation of Rotarian membership." [J. S. App. B-7] The trial court also correctly stated that even if Rotary were a commercial club explicitly rendering economic services to its members, that fact would not justify compelling it to share those services "indiscriminately with any member of the public who desires membership." [J. S. App. B-12] As noted above, groups formed for the economic benefit of their members have frequently been held entitled to First Amendment protection. The key issue is whether the group engages in "gender discrimination in the allocation of publicly available good and services." [468 U.S. at 625]

Even the California Court of Appeal was compelled to recognize that Rotary is not public. In holding that the Unruh Act requires local Rotary clubs to admit women to membership, it said:

It [the Unruh Act] does not require International to change its objectives or to open membership to the



*entire public at large*, nor does it invalidate its "inclusive, not exclusive," *selective* membership requirements. [J. S. App. C-2] [emphasis added]

Evidently, the Court of Appeal accepted as facts (i) that Rotary is not open to the public at large, and (ii) that it has selective membership requirements. Further, it evidently believed that neither of such facts constitutes an act "of invidious discrimination in the distribution of publicly available goods, services and other advantages," which causes "unique evils that government has a compelling interest to prevent." [468 U.S. at 628] Only the exclusion of women from membership was condemned. But once it is seen that Rotary clubs are not commercial organizations engaged in distribution of "publicly available goods, services and other advantages," requiring admission of women to membership fails utterly to further a state interest so compelling as to overcome the rights of the members of such clubs to both freedom of intimate and of expressive association. As this Court noted in *Roberts*:

... when the State interferes with individuals' selection of those with whom they wish to join, freedom of association in both of its forms may be implicated. [468 U.S. at 618]

In *Roberts*, not only did the Court find a compelling state interest in preventing invidious discrimination in the distribution of publicly available goods and services, it was also able to find that admission of women to Jaycees membership as a means of preventing such discrimination "abridges no more speech or associational freedom than is necessary to accomplish that purpose." [468 U.S. at 629] It noted that there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in . . . protected activities or to disseminate its preferred views." [468 U.S. at 627]



As it had when considering the Jaycees' claim to freedom of intimate association, the Court pointed out:

. . . the Jaycees already invites women to share the group's views and philosophy and to participate in much of its training and community activities. Accordingly, any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best. [468 U.S. at 627]

Here, on the other hand, the record establishes that meetings are not open to the public, that joint meetings with other service clubs are discouraged, and that women have no place in the official Rotary organization. The trial court expressly found that the admission of women to membership in local California clubs "would comprise a material interference with deeply felt choices of associational preference of many Rotarians" and that since "continued successful worldwide operation of Rotary is dependent on a delicate balance of divergent attitudes in diverse cultures," "judicial interference with this balance . . . would risk a material and harmful disruption of the cooperative integrity of Rotary." [J.S. App. B-6 - B-7]

The Court of Appeal agreed that the evidence "supports the trial court's finding that the male-only membership policy is valued by a substantial majority of Rotarians throughout the world and that, as a rule that has been internally agreed upon, it has enabled the organization to work effectively on a worldwide basis," but concluded that this was insufficient to support a finding that "the admission of women into the local Rotary Club of Duarte would cause the downfall of the District or International or seriously interfere with Rotary's objectives." [J. S. App. C-30 - C-

31] The Court was moved by what it believed to be "arbitrary and blatant acts of sex discrimination against the women of the state." [J. S. App. C-31] But in striking down Rotary's male-only membership requirement, and requiring proof of ruin to Rotary, the California court did violence to the First Amendment which protects associational rights against *any* abridgement in the absence of a compelling state interest. Since Rotary is not offering "goods," "privileges," or "advantages" to the public at large, excluding only females, such compelling state interest in enforcing the most drastic of remedies—invalidation of membership policies—simply does not exist.

. . . as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational. [*Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 124 (1981)]

Rotary, Kiwanis, the Lions, Zonta, the Girl Scouts, the Boy Scouts and the Boys' Clubs of America, like hundreds of other selective membership organizations with single-sex membership policies which are not engaged in the commercial distribution of publicly available goods and services, are entitled to the shield of the First Amendment to protect such policies regardless of whether they are regarded as wise or as invidiously discriminatory.

In the instant case, the State of California believes sex discrimination in private associations to be harmful to women, if not to the entire citizenry of the State. Therefore, it asserts the right to proscribe it. But if this were all that were required to abridge First Amendment rights, those rights would indeed be illusory, for any association of which the state did not approve could be legislated out of existence to

advance the state's interest in eliminating the disapproved activity.

The California courts in this and other cases<sup>7</sup> have elevated egalitarian goals above the constitutional rights of all citizens. This Court should reaffirm those rights, apply them to the members of local Rotary clubs, and reverse the decision in this case.

### III

#### **The Unruh Act is both vague and overbroad**

Appellees incorrectly assert that the vagueness and overbreadth of the Unruh Act are not before this Court. It is evident that the trial court, in reaching its decision that the Unruh Act was inapplicable to Rotary clubs, was influenced by its belief that, if it were, it would be overbroad:

Were the Unruh Act applicable to the membership policy of Rotary, it would not merely eliminate selectivity as to women; it would eliminate virtually *any* discretion in the selection of members. [J. S. App. B-13] [emphasis in original]

In appellants' brief to the Court of Appeal, it was explicitly contended:

An even more serious potential for vagueness and overbreadth is that the Unruh Act (unlike the Minnesota statute) does not limit prohibited discrimination to race, color, creed, sex and other categories specifically noted in the statute; rather it prohibits substantially *any*

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<sup>7</sup>*Curran v. Mt. Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712 (1983) (Boy Scouts must admit homosexual to leadership position); *Isbister v. Boys' Club of Santa Cruz*, 40 Cal.3d 72, 707 P.2d 212 (1985) (Boys' Club must admit girls).

selectivity among customers . . . . This may be an appropriate regulation for the clientele of shopping centers, apartment houses, motels, gas stations, and coffee shops. But it is a blunt instrument when applied to organizations like Rotary where voluntary fellowship and congeniality are of the essence, or to any other organization entitled to First Amendment freedoms wherein "precision of regulation must be the touchstone in an area touching our most precious freedoms." *Elrod v. Burns*, 427 U.S. 347, 363 (1976). "It is enough [for unconstitutionality] that a vague and broad statute lends itself to selective enforcement against unpopular causes." *NAACP v. Button*, 371 U.S. 415, 435 (1963). [Brief at 26]

Appellants submit that they are fully entitled to raise the issues of vagueness and overbreadth, and that the Unruh Act, as construed by the California courts in other cases and in this case, is both.

As this Court said in *Roberts*:

The void-for-vagueness doctrine reflects the principle that "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [468 U.S. at 629] [citation omitted]

Vague laws offend several important values, as Justice Marshall noted in *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police-

men, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [408 U.S. at 108-109]

Although each case involving allegations of vagueness clearly must stand upon its own facts, guidance may be obtained from the tests set forth in *Connally v. General Construction Co.*, 269 U.S. 385 (1926), cited in *Roberts*.

. . . the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, or as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co.*, 255 U.S. 81, 92, "that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." [269 U.S. at 391-392] [citations omitted]

The *Cohen Grocery* case cited in *Connally* involved the Food Control Act of 1917, which made it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities." The Court struck it down, saying:

Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in



the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against . . . to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. [255 U.S. at 89-90]

A few other examples may be of some use. "The requirement that an activity be 'wholesome' before it is subject to approval is unconstitutionally vague." *Shamloo v. Mississippi State Board of Trustees*, 620 F.2d 516, 524 (5th Cir. 1980). A statute prohibiting cancellation of a motor vehicle dealer's franchise "unfairly, without due regard to the equities of said dealer and without just provocation" was invalidated in *General Motors Corporation v. Blevins*, 144 F. Supp. 381 (D. Colo. 1956), and, similarly, a statute prohibiting a motor vehicle dealer from "having indulged in an unconscionable practice relating to said business." *Trail Ridge Ford, Inc., v. Colorado Dealer Licensing Board*, 543 P.2d 1245 (Colo. 1975). The Colorado Supreme Court commented:

"Unconscionability" is a concept that brings forth certain general feelings in the minds of all of us. The parameters of those feelings and reactions, however, vary widely as between individuals and what is "unconscionable" could well vary from Board to Board. [543 P.2d at 1246]

With these decisions in mind, an analysis of the Unruh Act as construed by the California courts clearly indicates that it must fall. As the Court of Appeal correctly noted, the California Supreme Court, in *In re Cox*, 3 Cal.3d 205, 212, 474 P.2d 992 (1970), established the principle that the Act



interdicts "all arbitrary discrimination by a business enterprise." The types of discrimination listed in the Act were there held to be "illustrative, rather than restrictive, indicia of the type of conduct condemned."

The question then becomes, does the term "arbitrary" have a technical or other special meaning well enough understood for persons of common intelligence to know what discriminatory conduct is and is not lawful, or has it been so construed as to render it an intelligible standard, as this Court required in *Connally*? An objective analysis indicates that the answer is a resounding "No."

"Arbitrary," according to the first definition in *Webster's Dictionary of the English Language Unabridged* (Encyc. ed. 1977), is "not governed by principle; depending on volition; based on one's preference, notion, or whim." A statute which does no more than prohibit "arbitrary" conduct, *i.e.*, conduct based on "one's preference, notion, or whim" clearly leaves the decision as to whether or not a particular action is "arbitrary" to the discretion or judgment of the court. As stated in *Grayned*, it is precisely this delegation of a basic policy matter to judges and juries on an *ad hoc* and subjective basis that causes a statute to be unconstitutionally vague.

It would, of course, be possible for an otherwise vague statute to be made precise by judicial interpretation, but this is not the case with the Unruh Act. In *In re Cox*, 3 Cal.3d 205, 212, 424 P.2d 992 (1970), the Court stated what might appear to be a useful rule: "this broad interdiction of the act is not absolute; an organization may establish reasonable regulations that are rationally related to the services performed and facilities provided." However, as will appear, this apparent restriction is now without meaning.

In *Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721, 640 P.2d 115 (1972), a rental apartment building sought to justify its policy of excluding children on the ground that children "as a class" are "noisier, rowdier, more mischievous and more boisterous" than adults. The California Supreme Court rejected the contention that it was reasonable for the landlord to "seek to achieve its legitimate interest in a quiet and peaceful residential atmosphere by excluding all minors from its housing accommodations, thus providing its adult tenants with a 'child free' environment." The court held that exclusion of an entire class for *any* reason was "arbitrary."

At the same time, however, the *Marina Point* court stated that "age qualifications as to a housing facility reserved for older citizens can operate as a reasonable and permissible means under the Unruh Act of establishing and preserving specialized facilities for those particularly in need of such services or environment." [30 Cal. 3d at 742-743]

In *Curran v. Mt. Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712 (1983), the prohibition against exclusion of any class of person was expanded further:

Nor can an exclusion be justified only on the ground that the presence of a class of persons *does not accord with the nature of the organization or its facilities*. [*Id.* at 733] [emphasis added]

In that case, exclusion of a homosexual from a leadership position in the Boy Scouts was held unjustifiable. But, an earlier case, *Marsh v. Edwards Theatres Circuit, Inc.*, 64 Cal. App. 3d 881 (1976), where the court said, "... section 51 and the remedies provided in section 52 have no application to discrimination against the physically handicapped," remains the law in California.

Finally, in its most recent pronouncement on the subject, the California Supreme Court, in *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 707 P.2d 212 (1985), virtually destroyed the concept of "reasonable regulations that are rationally related to the services performed and facilities provided." Ruling that it is impermissible to restrict membership in a boys' club to boys, even though the purpose of the club is to combat juvenile delinquency, and boys are four times more likely than girls to get into trouble with the law, the court said:

Nor can we accept Justice Kaus' suggestion that the Club has obeyed the Act because its decision to devote its resources to the greater delinquency problem it perceives among male youth is "rational" and taken in "good faith." *Marina Point* made clear that "reason" and "good faith" are not enough to avoid a finding of "arbitrary" discrimination. Our opinion condemned the adults-only policy there at issue even to the extent it rested on *true* assumptions about the general difficulties of living with children . . . Were good faith and bare rationality sufficient to permit group discrimination, the Act would have little meaning. [40 Cal.3d at 89 n.19]

The Unruh Act thus prohibits some forms of discrimination but not others; and "reason" and "good faith" will not be sufficient to preclude a finding that a decision is "arbitrary." The strong dissents in both *Marina Point* and *Isbister* reveal that even Supreme Court Justices cannot readily determine what is safe conduct under the Unruh Act<sup>8</sup>. The Act provides for treble damages, injunctive relief, and the awarding of attorneys' fees, but affords no protection to parties unjustly accused of its violation. Such a statute

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<sup>8</sup>Cf. *Martin v. International Olympic Committee*, 740 F. 2d 670 (9th Cir. 1984) (Ninth Circuit noted ambiguity in California courts' interpretation of scope of Unruh Act).

simply cannot stand. As the California Supreme Court itself has held:

... language which attempts to draw a line separating proscribed conduct from conduct which is either protected or not otherwise proscribed is on dangerous ground when it must depend on qualifying words such as "reasonable" or "substantial" to define the line beyond which proper conduct becomes criminal. [*People v. Barksdale*, 8 Cal. 3d 320, 328, n.3, 503 P. 2d 257 (1972)]

Further, the Unruh Act is also unconstitutionally vague in requiring that all persons be accorded "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind." In *Alcorn v. Anbro Engineering, Inc.*, 2 Cal.3d 493, 500, 468 P.2d 216 (1970), the California Supreme Court held that the Unruh Act is limited to discrimination by a business establishment "in the course of furnishing goods, services or facilities to its clients, patrons or customers." However, it no longer appears that an organization need be furnishing goods, services or facilities to customers to be within the grasp of the Unruh Act. Any organization with "businesslike attributes," whatever they may be, can be caught.

In *O'Connor v. Village Green Owners Assn.*, 33 Cal.3d 790, 662 P.2d 427 (1983), cited with approval by the Court of Appeal in this case, the California Supreme Court held that a nonprofit homeowners' association of a condominium development violated the Unruh Act when it attempted to enforce an age restriction in the covenants, conditions and restrictions of the development. The Court held that the association was a "business establishment" within the scope of the Act because it had "sufficient businesslike attributes." All of such attributes related to services performed for the owner-members of the association, and, as Justice Mosk

pointed out in his dissent, the association could hardly be said to be a commercial enterprise serving customers, clients or patrons.

In *Curran v. Mt. Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 732-733 (1983), the California Court of Appeal held that the term "business establishment" governed by the Unruh Act "includes all commercial and noncommercial entities open to and serving the general public." It held that the Boy Scouts was such an entity, stressing the facts that the national organization owns the copyright of the Boy Scout emblem and uniform, which are franchised for retail sale, and that the national organization publishes and sells a great variety of books. Having found "that the Boy Scouts, of which the defendant is a part, is a business establishment within the meaning of the Unruh Act," the court held that exclusion of a homosexual from a leadership position was arbitrary and prohibited by the Act. It is evident that this did not involve discrimination in supplying goods or services to clients or customers.

In the instant case, the Court of Appeal stressed at great length the "businesslike attributes" of Rotary International. [J.S. App. C-16 - C-22] As to the local Rotary clubs, the court stressed what it believed to be the "business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers." [J.S. App. C-22 - C-27] However, the Court of Appeal held that, applying the Unruh Act to Rotary so as to require the admission of women "does not require [it] . . . to open membership to the entire public at large . . ." [J.S. App. C-2]

Thus, we see that, not only may virtually any type of entity be found to be a "business establishment," it is not possible to determine whether or not protection may be obtained from a finding, as the trial court made here, that an



entity is not engaged in "furnishing goods, services or facilities to its clients, patrons, or customers." *Alcorn*, 2 Cal.3d at 500. It is even impossible to know whether it is necessary for the entity to be "open to and serving the general public," *Curran*, 147 Cal. App. 3d at 732, or whether it is sufficient that "a particular group" be excluded, even if that group consists of everyone but boys from 8 to 18. *Isbister*, 40 Cal.3d at 96 (Kaus, J., dissenting). Note that the Court of Appeal here held that even though Duarte was a "business establishment," it was not required to open its membership to the "entire public at large"—only to women. [J.S.App. C-2]

In addition, the construction which the California Court of Appeal gave to the Unruh Act in this case injects material uncertainty into California's "choice of law" rules regulating foreign corporations. Heretofore, California has applied the law of the domicile, rather than California law, for adjudicating internal policy disputes of foreign corporations. *Signal Oil & Gas Co. v. Ashland Oil & Refining Co.*, 49 Cal.2d 764, 774, 322 P.2d 1 (1958); *American Center, etc. v. Caverner*, 80 Cal.App.3d 476, 485 (1978). In this case, the court departed from these principles to apply California law, but gave no guidance as to the criteria governing its decision, although it found *Order of Travelers v. Wolfe*, 331 U.S. 586 (1947), not controlling. This alone renders the Unruh Act unconstitutionally vague.

Finally, in addition to being irreparably vague, the Unruh Act is unconstitutionally overbroad. It does not confine the scope of its regulation to those limited and particular private membership practices which California might have a compelling interest to regulate.

The Court of Appeals asserts that California has a compelling interest in "abolishing sex discrimination by



business establishments". [J.S. App. C-37] That compelling interest is described as guaranteeing equal access to "substantial business benefits". [J.S. App. C-29] But in fact the statute was here construed as mandating admission to Rotarian membership of women who admitted that they had no compelling economic interest in being members of a Rotary club. [J.S. App. B-7] Moreover, the statute is not limited to suppressing sex discrimination. It has been construed as prohibiting *all* "arbitrary" membership restrictions, i.e. all membership restrictions based upon the "preference, notion, or whim" of the members. Such preferential (i.e. "arbitrary") discretion in selecting one's associates is the fundamental essence of freedom of association. Prohibiting "arbitrary" membership policies effectively obliterates *all* freedom of association.

Moreover, freedom of association guarantees make private membership restrictions presumptively immune from state regulation. The state or other entity attacking the membership policy has the burden of proof and persuasion in justifying any curtailment of such exercises of First Amendment rights. *Healy v. James*, 408 U.S. 169, 183-185 (1972); *Britt v. Superior Court*, 20 Cal. 3d 844, 855-856, 574 P.2d 766 (1978). Applying the Unruh Act to such policy turns this constitutional presumption of validity on its head and requires the organization to shoulder the burden of proving a "compelling societal need" to keep anyone out. *Marina Point*, 30 Cal. 3d at 743. Imposing such a burden of justification upon the exercise of freedom of association goes beyond constitutionally legitimate regulatory powers.

While the test enunciated in *Alcorn* that the Unruh Act is limited to discrimination "in the course of furnishing goods, services or facilities to [an entity's] clients, patrons or customers," would suffice to meet the constitutional

requirement expressed in *Roberts* that the entity be engaged in "acts of invidious discrimination in the distribution of publicly available goods, services and other advantages," application of the Unruh Act to any entity with "sufficient businesslike attributes" which is unable to show a "compelling societal need" for its exclusionary practices renders it too broad, too applicable to constitutionally protected activities to be sustained.

Finally, a statute which, as here, directly regulates First Amendment expression must be neutral with respect to the content of the expression. Where state regulations are not neutral, even regulation of commercially oriented expression will be unconstitutional. *Bolger v. Youngs Products Corp.*, 463 U.S. 83 (1983); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980). Here, instead of being neutral, the public accommodation statute has a bias against any restriction of public access. *Orloff v. Los Angeles Turf Club*, 36 Cal. 2d 734, 739, 227 P.2d 449 (1951), cited with approval in *Cox*, 3 Cal. 3d at 213; *Curran*, 147 Cal. App. 3d at 733. Even the remedies are biased in that they allow treble damages, minimum damages, and attorneys fees to the party attacking the membership restrictions but provide no equivalent compensating incentives for the defendant organization to defend its First Amendment freedoms.

The Unruh Act is thus not congruent with the asserted compelling state interest and does not conform to the neutrality and burden of proof standard for a statute validly regulating First Amendment expression. It is unconstitutionally overbroad.

## CONCLUSION

Millions of Americans belong to associational groups formed for a variety of purposes. These include service clubs like Rotary, Kiwanis and Zonta, fraternal organizations like the Elks and Moose, national and ethnic organizations like Norwegian clubs, and local social and recreational clubs, such as country clubs, athletic clubs, or luncheon clubs. In virtually all such organizations, a highly prized aspect of membership is the fellowship that is, in substantial part, based on selective membership criteria. Such criteria may vary, in particular instances, from profession or occupation, to religion or national origin, to age, to residence, to gender, or to some combination of these or other means of identification. All of such organizations contribute to the richness and pluralism of American society which render it unique in the world today.

This case, and the earlier California cases discussed, present grave risks that well-meaning state legislatures and courts will intrude into the membership policies of some, if not all, of such groups. A number of cases already have been brought under various state statutes proscribing discrimination in places of public accommodation. These are discussed in the *amici curiae* briefs supporting appellants' Jurisdictional Statement and need not be reviewed here. It is sufficient to say that *any* exclusionary policy will appear "arbitrary" to the excluded; grass is well known to be greener on the other side of the fence. But merely labeling the membership policies of the Junior League, Zonta, Rotary or Indian Hill Club as "arbitrary" or even "invidious" is not enough. The Constitution and the Bill of Rights exist to get "government off the backs of people." *Schneider v. Smith*, 390 U.S. 17, 25 (1968). Freedom to select one's associates is a vitally important right and it must be preserved.

Appellants urge the Court to reverse the California Court of Appeal in this case and, holding that local Rotary clubs are entitled to constitutional protection against the application of the Unruh Act, to make clear that such protection is broadly available to all selective membership organizations in which fellowship plays a significant role.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

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**BOARD OF DIRECTORS OF  
ROTARY INTERNATIONAL AND  
ROTARY DISTRICT 530,**

*Appellants,*

*vs.*

**ROTARY CLUB OF DUARTE,  
MARY LOU ELLIOT and  
ROSEMARY FREITAG.**

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APPEAL FROM  
THE COURT OF APPEAL OF CALIFORNIA  
SECOND APPELLATE DISTRICT

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**APPELLEES' BRIEF**

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## QUESTIONS PRESENTED

1. Should the Court dismiss the appeal because the record does not provide an adequate basis upon which to decide the questions posed by the appellants?
2. Do the associational interests of a large, public service organization override the application of California's public accommodations statute?
3. Is the California public accommodations law unconstitutionally vague or overbroad?



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IN THE SUPREME COURT  
OF THE UNITED STATES

OCTOBER TERM 1986

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BOARD OF DIRECTORS OF ROTARY INTERNA-  
TIONAL AND ROTARY DISTRICT 530,

Appellants,

v.

ROTARY CLUB OF DUARTE, MARY LOU ELLIOT  
and ROSEMARY FREITAG.

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APPELLEES' BRIEF

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JURISDICTION

This Court has no jurisdiction over this appeal. The issue of the validity of the California public accommodations law (the "Unruh Act") as being repugnant to the Constitution of the



United States was not drawn into question in the proceedings below, as required by 28 U.S.C. section 1257(2).

The quotations on pages 3 and 4 of appellants' ("International") brief demonstrate that they did not question the validity of the Unruh Act in the manner necessary to invoke this Court's appellate jurisdiction under that section. See, e.g. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 562 n.4 (1980); Hanson v. Denckla, 357 U.S. 235, 244 (1958); Stern, Gressman & Shapiro, "Supreme Court Practice" 113 (6th ed. 1986).

International argued in the courts below that its federal rights prevented the application of the statute to it, not that application of the statute to its set of facts would render the statute void under federal law.

Charleston Federal Savings & Loan Association v. Alderson, 324 U.S. 182 (1945), quoted by International [at 4-5], supports appellees ("Duarte"), not International. As Stern, Gressman & Shapiro states, citing Alderson in support,

"[I]t is necessary for appeal purposes that the litigant make specific and plain in the state court his contention that the application of the statute to his particular circumstances would make the statute void under federal law. If he chooses not to phrase his claim in that manner but argues instead that his federal rights prevent application of the state statute to him, an adverse decision amounts to a denial of his assertion of federal rights rather than a validation of the state statute, and review can be

had in the Supreme Court only  
via certiorari under §1257(3)."  
At 113.

That is the case here.<sup>1</sup>

#### STATEMENT OF THE CASE

Rotary International is a public service organization [Joint Appendix ("J.A.") 35] of 19,788 clubs<sup>2</sup> in 157 countries. [Appellants' brief ("app. br.") 7] In 1982 the total individual membership for all of the clubs was 907,750. [*Id.*] The average size is therefore 46 members, with a range from fewer than 20 members to more than 900. [Appendix to Jurisdictional Statement ("J.S. App.") G-15]

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<sup>1</sup>If the Court agrees, as we believe it should, that jurisdiction does not lie, we urge that certiorari not be granted. This matter is argued more fully at point IV of this brief.

<sup>2</sup>Rotary has since grown to over 21,000 clubs. 1 Gale, Encyclopedia of Associations 1053 (21st ed. 1987).

A fundamental principle of International is that the local clubs are substantially autonomous. [J.A. 35] Members join Rotary through the local clubs [J.A. 79] and each club drafts its own by-laws, which include the method it uses to enlarge its membership. [J.A. 88; exh. A-3 to deposition of Herbert A. Pigman, International's general secretary, 1981 Manual of Procedure ("Manual") 315 (see J.S. App. G-6-8)] Although International has recommended procedures for admitting new members (as detailed in its brief at 7-8), it does not require the clubs to abide by these requirements. [J.S. App. G-18]

Individual clubs do not have any authority over the admission to membership of new clubs in Rotary International. The members of the clubs have

no authority over who may become members of the other clubs. [J.A. 53] While the admission of new clubs is nominally within the authority of the 17-man board of directors [Manual 247], it is International's general secretary who actually decides which ones are admitted. [J.A. 53]

When clubs become affiliated with International, there are certain minimal rules they are obliged to follow. These rules include having only business, crafts and professional men as members [J.A. 35, 61], meeting once a week [Manual 303], and accepting at their meetings any Rotarians visiting from other clubs. [J.A. 85] They are also required to use International's classification system [J.A. 86-88; Manual 239-40, 303-04], which in theory

limits membership to one person per profession, business or craft classification. [J.A. 61; Manual 240] Clubs must charge new members an admission fee of at least \$20 and annual dues of at least \$25. [J.A. 51] Finally, both International and the local clubs are prohibited from taking any political or religious positions. [J.A. 59; Manual 309; S.J. App. G-47, 65]

International continually strives for growth, both in the number of clubs [J.A. 50-54; J.S. App. G-33; Manual 292] and within each individual club. [J.A. 61-66, 70-73] International's board of directors has a duty to extend Rotary throughout the world by the organization of new clubs. [Manual 292] Clubs are grouped into districts, with a district governor in charge of each one. [J.A. 48] District governors are



expected to organize a Rotary Club in every community. [Id.] An objective of Rotary International is to include in each local club a representative from every business, profession and institution in the community, and the district governors are also expected to help each club fill these membership objectives. [J.A. 36] There is no upper limit to the size of a club. [J.A. 61-62]

Rotary International's wide-ranging activities include a secretariat of 300 persons with offices in six countries [J.A. 36] and 403 district governors worldwide. [J.S. App. G-14] Its business operations run into millions of dollars a year [J.A. 52, 56, 67, 74-75; Manual 297; J.S. App. G-5] and it maintains a busy publishing house, "producing books, manuals, pamphlets,

and periodicals" in as many as 19 languages [J.A. 83] and numbering in the hundreds. [J.S. App. G-5]

Public relations is used to achieve growth. International and the clubs publicize their activities. [J.A. 22-23, 41-42, 46, 49, 60, 64, 70-73, 95-96] Signs are hung by the road to announce Rotary's presence in town. [J.A. 44] The number of media representatives who may be members is unlimited [J.A. 88], and local clubs are encouraged to have full representation of the press on their rosters. [J.A. 40] Clubs are asked to have non-Rotarians at their meetings to inform the community about Rotary [J.A. 25, 39, 66-67] and are urged to provide speakers about Rotary to other groups. [J.A. 40] They are to inform the public what Rotarians are doing in the community [J.A. 42]

and try to have their weekly meetings reported in the local press. [J.A. 71] Clubs have joint meetings with other service clubs [J.A. 39] and community organizations. [J.A. 42] The general public is involved in Rotary activities. [J.A. 41-43, 77]

International licenses commercial firms to use its official emblem and receive royalties for the use. [J.A. 67] International's magazine, "The Rotarian" [exh. F to Pigman deposition; J.S. App. G-43], solicits commercial advertising [J.A. 74] and is sold to libraries, hospitals, schools and other reading rooms. [Manual 319] An annual directory is published "[f]or the convenience of Rotarians who travel," listing hotels owned or operated by Rotarians. [J.A. 75]

It is common practice for members of local clubs to deduct their dues from their income taxes or to have the dues paid by their companies. [J.S. App. C-25-26; R.T. 68-69; J.A. 34] International encourages local clubs to have members give "confidential business advice and assistance to Rotarians who may request such help" and urges clubs to provide clinics for discussing economic problems. [J.A. 40] It issues publications that illustrate business problems and their solutions [J.A. 24] and holds meetings at which Rotarians learn management techniques that help increase their business or professional skills. [J.A. 14]

Although International's rules prohibit the admission of women into local clubs, women do participate in

Rotary activities. [J.A. 44-45, 68]  
They attend meetings [J.A. 25, 39, 67],  
and young women 14 to 28 years old may  
join Interact or Rotaract, organiza-  
tions sponsored by International.  
[Manual 193, 198, 204] International  
encourages the participation of women  
relatives of Rotarians in "ladies  
committees" and other associations of  
women relatives of Rotarians [J.A. 44-  
45, 68], and these women are authorized  
to wear the Rotary lapel button. [J.A.  
68]

#### PROCEEDINGS

In 1977, the Rotary Club of Duarte  
("Duarte") admitted women into its  
organization. Subsequently, Rotary  
International and its District 530 or-  
dered Duarte to expel its women mem-  
bers. When Duarte refused, Interna-  
tional expelled the club itself. [J.S.  
App. C-7-8]

After following International's internal appeal procedures to no avail, Duarte and its women members filed this lawsuit charging International with violating, inter alia, the Unruh Civil Rights Act, California Civil Code section 51. [J.S. App. C-8]

At the trial there were no disputed facts relating to the issues raised in this appeal.<sup>3</sup> The Los Angeles Superior Court held that International had not violated the Act.<sup>4</sup> The California

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<sup>3</sup>The only facts in dispute related to an estoppel cause of action which was not appealed.

<sup>4</sup>The findings of fact International ascribes to the trial court [see, e.g., app. br. 6, 9, 10, 11, 12] were legal conclusions based on uncontested facts. An appellate court is not bound by a trial court's "findings" when there is no conflicting evidence presented. *Harry Gill Co. v. Superior Court*, 238 Cal. App. 2d 666, 670, 707 P.2d 195, 48 Cal. Rptr. 93 (1965).



Court of Appeal reversed, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (1986) [J.S. App. C], holding that the application of International's male-only rule to Duarte violates the Unruh Act.

The court of appeal later modified its opinion by revising its earlier statement that "the membership criteria set forth by International . . . is selective . . . ." [Cited at app. br. 9 and appearing at J.S. App. C-35] In the modified opinion, that quotation was deleted and replaced by the statement: "While the classification principle . . . might at first blush appear to be selective, Rotary's

own literature dispels this notion."<sup>5</sup>

[J.S. App. C-1]

International petitioned for rehearing in the California Court of Appeal. That petition was rejected, as was International's petition for review in the California Supreme Court. [J.S. App. D] On June 23, 1986, the court of appeal granted a 30-day stay of execution of its judgment. On July 18, 1986, the court denied a further stay.

On July 25, 1986, (then) Justice Rehnquist also denied a stay. Thereafter, on September 16, 1986, pursuant to the judgment of the court of appeal

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<sup>5</sup>As a consequence, contrary to International's brief, the court of appeal did not say membership is selective.

[J.S. App. C-40-41], the trial court issued a judgment

"mandating the Board of Directors of Rotary International and Rotary District 530 to reinstate . . . Duarte's charter . . . and permanently enjoin[ing them] from enforcing or attempting to enforce its male-only membership restriction against Rotary Club of Duarte." See attached appendix, pp. 1-2.

On November 3, 1986, this Court postponed jurisdiction and accepted the case for briefing and argument.

#### SUMMARY OF ARGUMENT

Large public service organizations like Rotary International are subject to the non-discrimination requirements of California's public accommodations law. Under that law, International may not exclude women from the advantages of membership in Rotary. This interpretation of the Unruh Act has been established by the California courts

and may not be challenged in this Court.

In the courts below, Duarte did not seek an order compelling any local Rotary Club to admit women as members. Instead, they sought to prevent International from requiring it to exclude women.<sup>6</sup> The judgment below is limited solely to the relief sought, leaving open the issue of whether local Rotary clubs in California must admit women.

International has submitted a brief based on the assumption that the lower court judgment applies the Unruh

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<sup>6</sup>Because this case was litigated in this context the record is wholly inadequate to consider whether the First Amendment would prevent the application of the Unruh Act to local Rotary clubs. For this reason, this Court should not exercise its certiorari jurisdiction if it finds, as it should, that no jurisdiction exists under 28 U.S.C. §1257(2). See §IV, *infra*.

Act to all local Rotary clubs in California, while ignoring the actual nature of the judgment below. Therefore, appellees have responded to this hypothetical case in the event this Court decides to consider that issue. However, the real issue is whether California may prevent International from imposing its discriminatory mandate on local Rotary clubs in California that choose to associate with women.

Rotary International is not the kind of organization that requires constitutional protection from state public accommodations laws. It is a huge operation with a great many business-like attributes. It is a significant force in communities across the United States and is a forum in which members receive significant business

and professional advantages. Indeed, the record in this case supports the conclusion that men join Rotary in large part to obtain these advantages, while also joining in the public service goals of Rotary.

International's male-only policy is a vestige of the turn of this century when Rotary was founded. There were few women community or business leaders in that era because of the stereotypical thinking about women and overt discrimination against them<sup>7</sup> which this Court has decried in many opinions. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973). International seeks to elevate its discriminatory practices

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<sup>7</sup>Even International's Board of Directors has recognized that the male-only rule has no place in a modern world. [Exh. F to Pigman deposition 50]



into an issue of fundamental constitutional principles of freedom of association. However, these claims trivialize those principles.

The state interests embodied in California's Unruh Act are indisputably compelling, as this Court unequivocally recognized in Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984). The elimination of unjustified and discriminatory barriers to the full and equal participation of women in community life is a major objective of government at the local, state and national level. The Unruh Act is intended to be as sweeping an instrument to eradicate such barriers as the United States Constitution will allow. Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985). In our consti-

tutional scheme states retain the right to pursue a vision of equality in community life beyond that which is required by the Fourteenth Amendment. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

Moreover, California has pursued its compelling interest in gender equality in a content-neutral manner which is least disruptive of the rights of non-governmental organizations to operate as they choose. International has not been singled out for any reason other than its attempt to mandate gender discrimination in the Rotary Club of Duarte. The simple command of the Unruh Act is that the blanket exclusion of women from participation in large public service organizations cannot be sustained without a justification peculiar to the specific goals, struc-

ture and operation of the organization. In the case of Rotary, the court of appeal found no such justification. [J.S. App. C-37]

California's content-neutral interest in gender equality must be weighed against International's interest in freedom of association. The spectre presented by International, of big government forcing the entry of women into cloistered little Rotary clubs across the country, cannot be squared with reality or the record in this case.

There is no dispute that the members of local Rotary clubs have interests which trigger some degree of First Amendment scrutiny. However, International's desire to hold on to its blanket male-only rule implicates these interests only in the most atten-

uated manner. International itself, of course, has no meaningful First Amendment associational interests. It is an organization of local clubs and thus has no human members with such interests. Thus, International seeks to assert the associational interests of persons not involved in these proceedings.

Whether this Court evaluates the character of the asserted associational interests from the standpoint of the impersonal, theoretical interests International possesses or the hypothetical local Rotary club members International seeks to represent, the character of the asserted interests does not qualify for constitutional protection.

At no level of Rotary is the organization "intimate" in the sense described by the line of cases relied

upon by this Court in Roberts. There are no doubt groups of men or women in our society who seek an oasis from public life in the form of small private clubs, but Rotary is not built upon this premise. The whole concept of Rotary is to create in each community a growing cadre of community leaders who are active and involved in community and business life. Rotary clubs are not the intensely personal, private associations that provide the kind of interpersonal relationships found in family life. International's claim of a right of associational intimacy has as little merit as the similar claim by the Jaycees, rejected in Roberts.

The fact that local Rotary clubs appear to choose their members with "selectivity" does not modify this conclusion. First, there is no evidence in

the record that local Rotary clubs in fact choose their members in a selective manner. Each one chooses its members in its own way. Even the form of selectivity that International claims is involved in this case is not the same form of selectivity which suggests the kind of intimate relationships worthy of constitutional protection. There is a wide range of relationships which have a degree of intimacy. But constitutional protection for intimacy has been reserved for a small core of human relationships, primarily those resembling families. Roberts, 468 U.S. at 619. International's proposed expansion of this core would severely undermine the pursuit of equality in our society and should be rejected.

Similarly, International's assertion of expressive associational inter-



ests must be rejected. In this area, this is a much easier case than Roberts. The Jaycees take political positions and engage in public debate, actions prohibited by International's rules. Those rules do not allow the kind of expressive activities to which this Court has offered constitutional protection over the years. The purpose of Rotary is to perform public service in a non-political, non-ideological manner. Even if these activities contain a kernel of expression in a First Amendment sense, the character of these interests is clearly tangential to the core concerns of Rotary.

Moreover, the judgment below permitting the Rotary Club of Duarte to admit women as members barely touches upon, much less impairs, such expressive activities. Women are already per-

mitted to participate in a wide range of Rotary activities as non-members. It is difficult to perceive what the impact of the California Court of Appeal's judgment on International's expressive interests could possibly be. International's brief before this Court identifies no credible injury to such interests.

The cases and principles relied upon by International arise most often in the context of this Court offering essential constitutional protection for the disadvantaged and minorities. Although these are neutral principles applicable to all groups, the application of these constitutional principles to International would shield the assertion of power and privilege in a manner that is unwarranted and destructive of legitimate state author-

ity in pursuit of the goal of equality in our society.

International's vagueness and overbreadth arguments similarly trivialize those doctrines. The Unruh Act has been in existence for decades and there is an extensive body of case law interpreting it. International cannot seriously contend that organizations in California have no notice of its meaning. The Act is well within the range of clarity of language and meaning which raises no serious constitutional vagueness question.

Nor is the Unruh Act substantially overbroad. There is no evidence that the California courts have ever interpreted the Act to reach constitutionally protected activity. The California courts have carefully considered First Amendment defenses raised by Unruh Act

defendants and have insisted that the Act be interpreted to satisfy constitutional requirements. In these circumstances the "strong medicine" of the overbreadth doctrine should not be applied even if the Court finds, as it should not, that the Act might have some application to constitutionally protected activity.

#### ARGUMENT

##### I. INTERNATIONAL'S ASSOCIATIONAL INTERESTS DO NOT OVERRIDE CALIFORNIA'S PUBLIC ACCOMMODATIONS LAW.

International's freedom of association arguments have been answered by this Court in Roberts v. United States Jaycees, 468 U.S. 609 (1984), and Hishon v. King & Spalding, 467 U.S. 69 (1984). International fails to demonstrate how the court of appeal's judgment threatens anyone's associational interests. This Court has held that

when associational rights are claimed in defense of discrimination, the challenge must fail unless such a threat is shown. See, e.g., Runyon v. McCrary, 427 U.S. 160, 176 (1976); Railway Mail Association v. Corsi, 326 U.S. 88, 96 (1945).

In Roberts, a local chapter of the Jaycees admitted women. Thereafter, the national organization imposed sanctions upon it. Id. at 614. The United States Jaycees argued that Minnesota's attempt to impose its public accommodations act upon it violated its right to freedom of association. Id. at 615.

This Court rejected that argument, explaining that freedom of association exists in two forms: intimate association and expressive association. Whatever freedom of association interests were implicated by the application of

the Minnesota law to the Jaycees, they did not outweigh the state's compelling interest in protecting its women residents from discrimination.

A. International's Associational Activities Are Not of an Intimate Nature.

Relationships that are entitled to freedom of intimate association

"are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. Roberts at 620.

These criteria were drawn from the Court's cases which recognize a degree of constitutional sanctuary for the intimacy of family relationships and other relationships which are akin to family relationships. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977) (cohabitation with



relatives); Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (raising and educating children). The intensity and "distinctly personal" aspects of such relationships were central to the scope of constitutional protection afforded to them.

The Jaycees were "outside of the category of relationships worthy of this kind of constitutional protection." Roberts at 620. International's characteristics place it, too, outside the scope of constitutional protection.

1. International is not small.

With a total membership in 1982 of 907,750 Rotarians in 19,788 local clubs, International is three times larger than the Jaycees, which had 295,000 members in 7,400 chapters. Roberts at 613.

International has a staff of 300, with offices in six countries. It operates a multi-million dollar business and maintains a sizeable publishing house.

A basic policy of International is to have the greatest possible growth. It has extension programs dedicated to forming new clubs. District governors are expected to try to organize a Rotary Club in every community and to fill as many of each club's classifications as possible. An organization this large and growth-oriented cannot claim the right to intimate association.

This Court has held that the size of an organization is one relevant factor in weighing associational rights. However, in certain situations, even members of a small and intimate group may have their associational rights

give way in the face of a more compelling state interest.

Thus, in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), six persons were living together in a single house large enough to accommodate them. A village ordinance prohibited more than two unrelated persons from living and cooking together in a household, although there was no such prohibition for persons related by blood, adoption or marriage. The Court sustained the ordinance on the ground that the zoning power of the city sufficiently overcame the individual rights of the occupants.

If groups as small and intimate as those in Belle Terre may have their

associational rights<sup>8</sup> overridden by a zoning ordinance, then certainly so large and impersonal an organization as International may not prevail in the face of a state's effort to eradicate sex discrimination.

2. International is not selective.

The mere fact that an organization is "selective" in its membership does not mean that a state may not prohibit it from discriminating in that selection. The question is whether the selectivity is substantially related to the objectives sought to be achieved. Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 150 (1980). Thus,

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<sup>8</sup>The Court stated, at 7, that the right of association was not involved in the record before it. Even so, the Court's ruling impinged on the intimate relationship of the people involved who wanted to live together.

for example, an organization may be so selective that it is open only to endocrinologists. That does not mean it can therefore exclude black or female endocrinologists, especially if its goal is to include a broad spectrum of those in the profession.

The reason "selectivity" is a factor in cases such as this is that the concept helps in determining whether the organization is "truly private."<sup>9</sup> As the court explained in United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 412, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1983), important in determining whether an organization is "private,"

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<sup>9</sup>This phrase is from this Court's opinion in Tillman v. Wheaton-Haven Recreation Association, Inc., 410 U.S. 431, 439 (1973)

is that the "membership is determined by subjective, not objective criteria."

International accepts new clubs on purely objective criteria. The essential qualification for a club to join International is that it be in a community with at least 40 occupational categories, and have as members at least 20 men from different businesses or professions. [Exh. C to Pigman deposition, Extension Manual; J.S. App. G-20-22] The decision to admit a new club is effectively made by only one person, the general secretary. The members of International have no say in that decision.

The admission of individual members is done by the local clubs, not by International, which does no selecting at all.



3. International is not se-  
cluded from others in the  
community.

A club is entitled to associational protection against a civil rights statute only if it is "truly private." Tillman v. Wheaton-Haven Recreation Association, Inc., supra. International is simply not "truly private" within the meaning of the constitutional protection for intimacy.

International puts itself forward, actively, into community affairs. Its clubs are urged to promote the Rotary name and activities at every opportunity, seek unlimited members from the local press, have non-Rotarians attend meetings and send speakers about Rotary to outside groups.

At international or regional meetings held in convention halls, International expects that the rental and

other expenses will be paid by "the city government, or the chamber of commerce, tourist association or a similar group." [J.A. 46] With Rotary signs at the entrance to cities and towns all over the world, International is dedicated to calling public attention to itself. These are not marks of a "private," secluded, non-business organization.

Even an organization as secluded as a law firm partnership may not use its associational rights to excuse its compliance with an anti-discrimination law. In Hishon v. King & Spalding, 467 U.S. 69 (1984), the question was whether the federal law against employment discrimination, Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.), prohibited a law firm from discriminating in its partnership deci-

sions. This Court held that law firms are not beyond the reach of Title VII, repeating its earlier holding that

"[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." Hishon at 78, quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973).

B. International's Associational Activities Are Not of an Expressive Nature.

This Court should not consider the issue of expressive association since it was not raised below. Furthermore, International has not explained in what expressive associational activities it is engaged.

In Roberts, this Court explained the freedom of expressive association as

"a right to associate for the purpose of engaging in those

activities protected by the First Amendment--speech, assembly, petition for the redress of grievances, and the exercise of religion." 468 U.S. at 618.

Thus freedom of association is a derivative right, applicable when it aids in the exercise of an express First Amendment right. No express First Amendment right is involved here.

Even when a First Amendment right is involved, freedom of association does not necessarily override a public accommodations law. In Roberts, this Court held that the Jaycees' right to expressive association did not override the Minnesota law. The Jaycees, however, does engage in public expression. It has taken stands on the draft, school funding, the Vietnam War and pornography, among other issues. United States Jaycees v. McClure, 709 F.2d 1560 (8th Cir. 1983).

As for Rotary International, there is no possible issue of infringement on its exercise of free speech or religion, since its policy specifically prohibits it or its clubs from taking any political or religious positions. [Manual 161] Thus this case raises no issue of infringement of expressive rights.

In its struggle to distinguish itself from the Jaycees, International notes that women were invited to participate in the Jaycees' activities, while on the other hand, Rotary has no official women's affiliates. [App. br. 20]

However, women do participate in Rotary activities. There are organizations of women auxiliary to local clubs. To be sure, "formal official, legal recognition" [J.A. 68] is not

given to these organizations, but their presence and assistance is encouraged and commended by International's board. Members of these committees are authorized to wear the Rotary lapel button. There is also no ban on women attending meetings or being speakers.

There are also women and girls in International's youth and young adult clubs, called Interact (for 14 to 18 year-olds) and Rotaract (18 to 28). Whatever might be the extent of women's participation in Rotary, in the Jaycees, as associate members, they accounted for only 2% of the membership. Roberts at 613.<sup>10</sup>

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<sup>10</sup>While International tries to show how dissimilar it is from the Jaycees, it also argues how much like Kiwanis it is. [App. br. 21] That is because of this Court's passing reference to "the Kiwanis Club" in Roberts. At 630. That reference was based on an illustrative



International's argument that Duarte bears the burden of justifying the application of the Unruh Act to International [app. br. 46] is not well

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remark by the Minnesota Supreme Court as to "the Kiwanis International Organization." United States Jaycees v. McClure, 305 N.W.2d 764, 771 (Minn. 1981). Neither in that court, in the federal courts, 534 F. Supp. at 773 and 709 F. 2d at 1577, nor in this Court was there sufficient evidence upon which to judge the real nature of Kiwanis. The evidence consisted merely of Kiwanis International's constitution and by-laws, a roster of the Minneapolis club members, and a thumbnail sketch of the International from 1 Gale, Encyclopedia of Associations (15th ed. 1980) [Roberts, appellants' brief 27] The most that can be said, as this Court did, is that there exists "a formal procedure for choosing members on the basis of specific and selective criteria." There is no evidence as to whether the procedure is actually followed. [See cases cited infra.] Nor is there evidence of whether there are any of the other considerations mentioned by this Court in Roberts, at 620, which would guide a court in deciding which rights--the anti-discrimination or the associational--should prevail.

taken. The one who discriminates bears the burden of proving the justification for the discrimination. As this Court said in Roberts, "The Jaycees have failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." 468 U.S. at 626. Similarly, in Hishon, "[The law firm] has not shown how its ability to fulfill [the duties of a lawyer] would be inhibited by a requirement that it consider petitioner for partnership on her merits." 467 U.S. at 626. This confirmed what lower courts had held. See, e.g., Nesmith v. YMCA, 397 F.2d 96 (4th Cir. 1968); Brown v. Loudon Golf & Country Club, 573 F. Supp. 399, 402 (E.D. Va. 1983)

International asserts that Rotary would be severely injured if women were admitted [app. br. 26, 34], but it does

not explain why or how Rotary would be injured. There seems to be a silent assumption that women are so different from men that their very presence will contaminate the organization. It is just such assumptions that this Court refused to accept in Roberts. See, e.g., 468 U.S. at 627-28.

The admission of women would not damage International. The very purpose of the Jaycees was the development of opportunities for young men. 468 U.S. at 612-13. Yet this Court held that the presence of women would not interfere with that purpose. Id. at 627. The object of Rotary International is public service. The presence of women obviously would not interfere with that purpose.

International points to NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 451 (1958), to argue that it is entitled

to protection for its objectives. [App. br. 27] Of course it is. Again, its objective is public service and the presence of women will not interfere. Even its secondary objective of fellowship will not be adversely affected by the presence of women, especially since women are already present in any case. (See discussion at IB.)

That point was made in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). Men were not allowed to enroll for credit in the nursing school of a university founded for the purpose of "the moral and intellectual advancement of the girls of the state." At 720. They were, however, allowed to audit classes. This Court rejected the university's contention that its gender-based discrimination was substantially and directly related to its objective,

saying: "To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men." At 730.

The real reason for International's exclusion of women seems to be that the organization started at a time when few women were in business. As Mr. Pigman explained, it became "part of the tradition and practice." [J.S. App. G-51] That is a flimsy basis upon which to deny women today the benefits of the public accommodations law.

The only concrete injury International suggests is the potential harm to its worldwide operation, but even then it does not say how its operation would be harmed. In some of the countries that have Rotary Clubs, women members might

not be accepted. [App. br. 11, 16, 34]  
But International fails to explain how,  
if some California clubs admit women,  
other countries would be impacted. All  
the admission of women means is that  
visiting foreigners might find women at  
Rotary meetings. But they already do,  
since women attend as guests.

Attitudes in other cultures were at  
issue in Fernandez v. Wynn Oil Co., 653  
F.2d 1273 (9th Cir. 1981). The Court re-  
jected the argument that a company could  
refuse to hire a woman as director of  
international operations because South  
American customers would not do business  
with a woman. Even though "the United  
States cannot impose standards of non-  
discriminatory conduct on other  
nations," no foreign nation can compel  
the non-enforcement of Title VII of the  
Civil Rights Act of 1964. Id. at 1277.



International is proud of its ability to operate worldwide because of its concern for diverse cultures. [App. br. 11] California residents are entitled to similar consideration.

C. California Has a Compelling Interest in Eliminating Sex Discrimination.

As this Court emphasized in Roberts, "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." 468 U.S. at 626. The types of "goods" (e.g., commercial programs and benefits, and leadership skills), "privileges" and "advantages" (e.g., business contacts) offered by participation in the Jaycees are also provided by participation in Rotary.

International attempts to distinguish itself by stating that the Minnesota court relied on the fact that the

Jaycees "sells goods and extends privileges in exchange for annual membership dues."<sup>11</sup> [App. br. 15, 28, 29] But, in fact, International does the same thing. As the Conference of Private Organizations said in its amicus curiae brief in Roberts,

"The U.S. Jaycees is far from unique in having a large nationwide membership, which it vigorously seeks to expand . . . . The membership recruiting of the U.S. Jaycees is not unlike the practices or [sic] other restricted-class membership associations, such as national fraternal and service organizations." [At 11-12]

International is one of those service organizations. It, too, "sells" its memberships through its constant emphasis on growth and publicity.

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<sup>11</sup>This Court in Roberts, while noting that comment, at 616, does not rely on it.

International argues that Roberts does not govern because of the differences between the Jaycees and Rotary. In fact, the two organizations are remarkably similar. Both are non-profit membership corporations with educational and charitable purposes. Roberts at 612-13. [J.A. 35] Like the Jaycees, Rotarians join through local chapters, pay an initiation fee and annual dues, are entitled to participate in local, district (instead of state), regional and national activities. Rotary International, like the Jaycees, strives for membership growth and keeps a high public profile. The national headquarters of both organizations employs a staff to develop materials for local chapters to enhance individual development, community development and members' management skills. Both have

various products available to members.  
See Roberts at 613-14.

International argues that "Rotary clubs are not engaged in the commercial distribution of publicly available goods and services." [App. br. 26] In its brief in Roberts it said "The Jaycees do not exist for the purpose of providing goods and services to the general public." [At 17] The point was not significant in Roberts and should not be significant here.

In fact, many decisions have made it clear that in order for an organization to be subject to public accommodations statutes it is not necessary that it be engaged in the commercial distribution of publicly available goods and services. See, e.g., Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431 (1973) (a community swim-

ming pool); United States v. Slidell Youth Football Association, 387 F. Supp. 474 (E.D. La. 1974); National Organization for Women v. Little League Baseball, 127 N.J. Super. 522, 318 A.2d 33 (1974); United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1981) (boating). The question is not whether an organization is commercial, but whether it is of that private nature which will enable it to overcome a state's compelling interest in protecting against sex discrimination.

States have broad authority to pursue their own vision of equality and civil liberties, subject only to a showing that countervailing constitutional interests are seriously threatened. Pruneyard Shopping Center v.

Robins, 447 U.S. 74 (1980) (California may grant broader rights to engage in First Amendment activity in shopping centers than required by the First Amendment).

The Unruh Act effectuates California's century-old public policy of ensuring equal access for all members of the community to important institutions in public life. California courts have consistently underscored the importance of eradicating gender discrimination. See Koire v. Metro Car Wash, 40 Cal. 3d 24, 34, 707 P.2d 195, 219 Cal. Rptr. 133 (1985) ("men and women alike suffer from the stereotypes perpetrated by sex-based differential treatment"); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 20 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (legislative classifications based on gender are suspect for pur-



poses of equal protection analysis); Pines v. Tomson, 160 Cal. App. 3d 370, 392, 206 Cal. Rptr. 866 (1984) ("California's interest in eradicating discrimination on the basis of . . . sex is unquestionably 'compelling,'" citing Roberts, 468 U.S. at 623). Similar interests underlie the Unruh Act's prohibition against the exclusion of women from all but "truly private" groups.

The Unruh Act has implemented the state's policy of gender equality in the manner least disruptive of the internal operations of International. It does not require that all women or any given woman be admitted to Rotary, but it prohibits the blanket exclusion of women from participation.

According to this Court in Roberts:

"Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms." 468 U.S. at 623.

The rationale for the state's compelling interest is explained in Roberts:

"By prohibiting gender discrimination in places of public accommodation, the Minnesota Act protects the State's citizenry from a number of serious social and personal harms. [Discrimination] both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

. . . .

"That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." Roberts at 625.

One of the state's interests is in seeing that women do not suffer from the loss of business opportunities. People join business and professional associations to advance their careers.<sup>12</sup> So, too, they join Rotary to advance their careers. International claims this is not so. That claim does not stand up to scrutiny.

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<sup>12</sup>International criticizes the court of appeal for not having referred to the women plaintiffs' acknowledgment "that they did not feel that they had been impeded in their pursuit of their business and/or professional careers or financially damaged by any actions of Rotary International." [App. br. 30] The court of appeal properly ignored the point because it was irrelevant. The women plaintiffs were not impeded in the pursuit of their careers since they were admitted to the Duarte club. As for their not having joined for the express purpose of promoting their careers, that does not mean it was not an unstated purpose, as it undoubtedly is for most Rotarians.

The evidence substantiates that Rotary membership is an important business advantage. Club members must consider it to be, since they deduct their dues as business expenses from their income taxes or have the dues paid by their businesses. Even International's witness, a former cemeterian, had his dues paid by his company when he was employed. A former treasurer of the Bakersfield Rotary Club testified that 95-96% of the local members' dues were paid by their companies.

The IRS has allowed such deductions [J.S. App. C-25], thereby recognizing the primary business nature of the organization. The Internal Revenue Code provides that social club dues are deductible if the club is used primarily for business and the use is directly related to the conduct of the business.

26 U.S.C. §274(a)(2). Either many Rotarians are breaking the law or the claim that membership is not for business purposes is a hypocritical one.

International's general secretary insists that community service is the only reason for the Rotary Clubs' existence. [J.S. App. G-33-34] If that were true, it is unclear why membership should be limited to business and professional people. Surely a laborer can work in charitable activities. Rotary, by limiting membership to business and professional leaders, provides an opportunity for its members to make the right contacts.

The limit of one member per occupation serves to protect the classification holder's right to maintain his monopoly over beneficial contacts with members in other businesses. The excep-

tions for Rotarians who come from other clubs or a second person in each classification highlight the rationale for the rule. Those people may join, but only if the club's holder of the classification approves. [J.A. 86]

Even International acknowledges that Rotary provides important contacts. The Rotary Vocational Service handbook headlines: "In modern times, it is only by the power of association that men of any calling exercise their influence in the community." [Exh. B to Pigman deposition, vol. 3, Vocational Service 33 (see J.S. App. G-9-11)] That heading is followed by a discussion of ethical business practices:

"Daily relations with business or professional associates can provide every Rotarian with opportunities to demonstrate personally to his customers, clients, suppliers, competitors, or colleagues that the



ideal of Service can help form a truly solid basis upon which to achieve business and professional success." [J.A. 92]

Another way of stating it is in the well-known axiom of the business world: "who you know is at least as important as what you know." Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 Harv. C.R.C.L. L. Rev. 321, 322 (1983).<sup>13</sup>

Although many of the business benefits of Rotary are through personal contacts, there is direct help as well. Local clubs are expected to establish

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<sup>13</sup> See also, Willard, "Roberts v. United States Jaycees and the Affirmation of State Authority to Prohibit Sex Discrimination in Public Accommodations: Distinguishing 'Private' Activity, the Exercise of Expressive Association and the Practice of Discrimination," 38 Rutgers L. Rev. 341, 374-75 (1986); Note, 33 U. Kan. L. Rev. 771, 787 (1985), and authorities cited.

committees of members in different classifications who will give "confidential business advice and assistance to Rotarians who may request such help." [J.A. 40] International encourages clubs to provide clinics for discussing economic problems. Through Rotary publications and vocational programs members study business problems and their solutions.

Another service International provides for its members is business relations conferences. At these conferences

"[t]he Rotarian learns management techniques that help improve his own business or professional skills. He receives the inspiration of discussing business problems with experts in his own or related fields. And he enjoys the fellowship of sharing ideas with fellow Rotarians." [J.A. 14]

There are obviously business advantages to Rotary membership and Califor-

nia women are being injured by their exclusion.<sup>14</sup> This Court should look to the reality, not to International's denials of its business-relatedness. As was said in Watts v. Indiana, 338 U.S. 49, 52 (1949), "there comes a point where this Court should not be ignorant as judges of what we know as men."

In United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981), the Minnesota Supreme Court found that membership in community-wide, service-oriented, business-related organiza-

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<sup>14</sup>There is extensive literature showing the political, economic and cultural harm to women by exclusion from organizations such as Rotary. See, e.g., "Avner & Bacharach, Let's Make a Deal--When Private Means Business," N.Y. St. B.J., Oct. 1985, p. 12; Bartlette, Poulton, Callahan, Somers, "What's Holding Women Back," Mgmt. Wkly., Nov. 8, 1982; Ginsburg, "Women as Full Members of the Club: An Evolving American Ideal," 6 Hum. Rts. 1

tions provides enhanced leadership experience and an advantage in making business contacts. Membership in Rotary International does the same. Or as Rotary states it in its official motto: "He Profits Most Who Serves Best."

[J.A. 69]

II. IF THE LOCAL CLUBS WERE COVERED BY THE UNRUH ACT THEIR ASSOCIATIONAL INTERESTS WOULD NOT BE VIOLATED.

Whether the local clubs are covered by the Unruh Act is not at issue in this case. However, out of an abundance of caution, we discuss the matter. Were the judgment viewed as requiring local clubs to admit women, such a judgment would

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(1977); Jost, "Judges Make Private Clubs a Public Wrong," L.A. Dly. J., Sept. 22, 1986, p. 2, col. 4; Scheffrau, "Welcome to the Club (No Women Need Apply)," Women & Found./Corp. Philanthropy (1981).

not violate the clubs' constitutionally-protected associational rights.

"A fundamental principle underlying the administration of Rotary International is the substantial autonomy of the member Rotary Clubs." [J.A. 35] However, International does suggest guidelines, which provide a limited basis upon which to consider the associational rights of the clubs, under this Court's holding in Roberts.

In Roberts, at 620, this Court mentioned a number of factors--"size, purpose, policies, selectivity, congeniality"--which aid in determining whether associational interests can preclude application of anti-discrimination laws. Just as those factors did not lead to the conclusion that the Jaycees clubs may discriminate, so too, Rotary clubs may not discriminate.

International requires that there be at least 20 men in a community willing to be a club. Moreover, the club must be in an area where there are at least 40 classifications, which means at least 40 prospective members. There is no maximum number who can be in the club, since continual growth is an object of every local club. The goal is to have every business, profession and institution in the community represented. Yet, "[m]ost private clubs have limited membership." Nesmith v. YMCA, 397 F.2d 96, 102 (4th Cir. 1968).

Some clubs have over 900 members, more than twice the size of the clubs in Roberts. 468 U.S. at 621. The average club size is 46 as opposed to the Jaycees' average of 40. 468 U.S. at 613. There is a high turnover rate, between 10 and 20% a year. [R.T. 65]



The clubs that remain at or drop below their founding number of 20 are unsuccessful, rather than "intimate" or "private."

There is no evidence that the clubs are selective. International argues that they are, detailing the procedure for admitting members into local clubs as outlined in the recommended club by-laws. [App. br. 7-8] It then concludes that the "foregoing undisputed facts led the trial court to find that Rotary Clubs are highly selective in their membership." [App. br. 9] But the procedures International describes are nothing more than recommendations; the local clubs are not required to follow them. In fact, International's general secretary testified that "[t]he method of elec-

ting a member is in the province of the local Rotary Club." [J.S. App. G-18]

International's statement of facts makes it sound as though all clubs use the described election process. For example, International claims that "[m]embership in Rotary is by invitation only." [App. br. 7] It cites the Pigman deposition [J.S. App. G-49] and Focus on Rotary [Exh. B to Pigman deposition, vol. 1] to support its claim. But these statements are contradicted by the Manual of Procedure, which Mr. Pigman, the general secretary of Rotary International, said is "an authoritative statement of Rotary practices and principles." [J.S. App. G-7] According to the Manual, local clubs are allowed to adopt their own by-laws. [Manual 315; see also J.A. 88] Whether they adopt the recommended

method and how they arrive at the so-called one-person-per-business-or-profession rule is for them to decide.<sup>15</sup> [J.S. App. G-18]

Even if these procedures were requirements rather than recommendations, they would not necessarily qualify the local clubs for an exemption from the public accommodations law. Decisions under the federal public accommodations law, involving blacks, have held that even clubs with formal membership requirements are subject to

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<sup>15</sup>International's system does not limit clubs to one member per classification. There can be sub-classifications, such as criminal lawyer, corporate lawyer, probate lawyer, etc. [J.A. 87] And while there may be no more than two active members in each classification [J.A. 86], there may be an unlimited number of senior active, past service, press, clergy and diplomatic corps members. [J.A. 39; Manual 249-50] Thus, the so-called one-man classification system is not that at all.

the law. See Wright v. Salisbury Club, Ltd., 632 F.2d 309 (4th Cir. 1980) (two-member sponsorship, membership committee approval, board approval); Nesmith v. YMCA, 397 F.2d 96 (4th Cir. 1968) (substantial annual dues, membership committee, good moral character); Brown v. Loudoun Golf & Country Club, Inc., 573 F. Supp. 399 (E.D. Va. 1983) (good moral character, two-member sponsorship, membership ceiling, substantial initiation fee, board approval); United States v. Trustees of the Fraternal Order of Eagles, 472 F. Supp. 1174 (E.D. Wis. 1979) (two-member sponsorship, investigating committee, board approval, member blackball, good moral character, belief in God).

The courts in these cases considered the significant factor to be not what the written procedures are, but

whether they are actually used. Brown at 403; Eagles at 1175. The burden is on the club to show that its written procedures actually result in membership selectivity. Nesmith at 101; Brown at 403; Eagles at 1176. International has provided no evidence as to how the clubs actually select members.

International's purpose is that the membership be "inclusive, not exclusive." [J.A. 84] That is a "public," not a "private" characteristic.

International speaks of the local Rotary Club as "a body of men who are knit together in bonds of personal friendship and service." [App. br. 10] But any intimacy this suggests is impossible because of International's rule that all clubs must welcome visiting Rotarians, strangers whom they have never met. [J.A. 85] Once a club has

accepted a member, International and every other local club must accept him.

Local clubs are not secluded. The formation of a new club is announced in the media. All local clubs are expected to publicize their activities. They send speakers out to community groups to talk about Rotary and they proclaim their presence to the world by placing signs at the entrances of their cities. Further, clubs are encouraged to obtain full representation from all the local press in the community.<sup>16</sup>

There is nothing private nor secluded about Rotary club meetings. They are supposed to have in attendance employees, competitors, customers and

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<sup>16</sup>This rule conflicts with the rule prohibiting the admission of women, but International apparently does not contemplate there being women reporters.



salesmen of the members, students and others. Joint meetings are held with other service clubs and community services organizations. Appropriate measures are supposed to be taken to have the weekly meetings reported in the press. The emphasis is on maintaining a high profile.

Under International's own rules, the clubs are not "secluded." "Every Rotary club must have its windows and doors open to the whole world." [J.A. 85]

Strangely, International cites Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182 (D. Conn. 1974) for guidance on the interpretation of a "private club" exemption. [App. br. 25] But the factors in Cornelius lead to the conclusion that Rotary clubs are not private.

"To have their privacy protected, clubs must function as extensions of members' homes and not as extensions of their businesses." 382 F. Supp. at 1204.

Rotary clubs are extensions of their members' businesses, not their homes.<sup>17</sup>

### III. THE UNRUH ACT IS NEITHER VAGUE NOR OVERBROAD.

International argues that the Unruh Act is unconstitutionally vague and overbroad. Not only is neither true, but this Court should not consider the argument since it was not timely raised.

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<sup>17</sup>Moose Lodge, No. 107 v. Irvis, 407 U.S. 163 (1972), also, does not assist International. That case was decided on a state action rationale, not on associational grounds. Further, when the very same Moose Lodge was challenged under Pennsylvania's public accommodations act, it was held to be covered. Commonwealth Human Relations Commission v. Loyal Order of Moose, Lodge No. 107, 448 Pa. 451, 294 A.2d 594 (1972), appeal dismissed for want of a substantial federal question. 409 U.S. 1052 (1972).

A. International's Vagueness  
and Overbreadth Arguments  
Were Not Timely Presented  
to the California Courts.

International did not raise the issues of vagueness or overbreadth in its briefs in the trial court [C.T. 218, 294] nor in the court of appeal.

In its Petition for Rehearing before the court of appeal and in its Petition for Review before the California Supreme Court, both of which were denied without opinion, International made an argument based on "uncertainty." But this was too late, both under California law, Cain v. French, 25 Cal. App. 499, 502, 144 P. 302 (1914); Rule 29(b) (1), California Rules of Court, and in this Court. See Radio WOW v. Johnson, 326 U.S. 120, 128 (1945); Godchaux Co. v. Estopinal, 251 U.S. 179, 181 (1919). This Court ought not hear a matter that

was not properly presented to the courts below. [Id.]

In its brief, at 36-37, International sets forth a paragraph from its brief in the court of appeal and claims that it raised the vagueness and overbreadth issue before that court. That single paragraph was in connection with International's argument that the Unruh Act could be applied only to an organization "where such memberships comprise a vehicle for public sale of goods, services or commercial advantages." [International's brief before the court of appeal, p. 23] That was not an adequate presentation of the point to the lower court for decision.

B. The Unruh Act Is Not Unconstitutionally Vague.

In Roberts this Court noted that the

"void for vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" 468 U.S. at 629, citing Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

See also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

The Unruh Act is not vague in any constitutional sense. It prohibits all "arbitrary" discrimination in "business establishments," as those terms have been interpreted in numerous decisions over the past decades. Persons of common intelligence, and particularly large organizations with access to legal counsel, should not find the meaning and application of the Unruh Act difficult to understand. International's vagueness argument should receive the same treat-

ment received by the Jaycees' vagueness argument in Roberts. 468 U.S. at 629-30.

1. International has no standing to raise its vagueness argument.

International has no standing to challenge the Unruh Act on vagueness grounds, as the Act clearly applies to gender discrimination. The Act says, in plain English, that "all persons . . . of this state . . . no matter what their sex . . . are entitled to the full and equal accommodations, advantages, etc." As this Court emphasized in Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 495 (1982):

"A [person] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

This rule must be applied with caution when First Amendment rights are involved, but there is no basis for any



conclusion that the Unruh Act has any significant adverse impact on the exercise of First Amendment freedoms.<sup>18</sup> See §I, supra.

2. The term "arbitrary discrimination" has a clear meaning under the Act.

The critical point about the concept of "arbitrariness" within the meaning of the Unruh Act is that blanket exclusionary policies of entire categories of persons will seldom be permitted. Marina Point v. Wolfson, 30 Cal. 3d

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<sup>18</sup>International's "choice of law" contention hardly merits comment. The court below was correct in not considering Order of Travelers v. Wolfe, 331 U.S. 586 (1947), to be controlling. It isn't. See Clay v. Sun Insurance Office, Ltd., 377 U.S. 179, 183 (1964), limiting the case to its facts, and Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 558 (2d Cir. 1962), considering, even before Clay, that under this Court's decision in Richards v. United States, 369 U.S. 1, 15 (1962), the case no longer represented the law.

721, 738-40, 640 P.2d 115, 180 Cal. Rptr. 496 (1982). Absent a compelling specific justification for the blanket exclusion of a class of persons, entities covered by the Unruh Act may exclude people based only on a reasonable individualized basis.

In Marina Point, for example, this concept was applied to prohibit the blanket exclusion of children from a housing complex when there was no claim that there were grounds to exclude the particular child involved. In Webster v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985), the exclusion of all girls from local recreational facilities was found to be arbitrary.

In California, even true generalizations about a class may not be used to justify the exclusion of a class

member to whom the generalization does not apply. Id. at 740, citing Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) (pension system based on actuarial fact that women live longer than men invalidated because it might not be true of an individual woman). All people in California must be treated as individuals on their own merits by "business establishments of every kind whatsoever."

International asserts that the Unruh Act's prohibition of "arbitrary" discrimination "obliterates all freedom of association." [App. br. 46 (emphasis in original)] There is simply no support in California law for this absurd statement. If an association is "strictly private" the Act places no limitation at all on the association or its members. If the association is covered by

the Act, it may still adopt certain kinds of discriminatory policies if an adequate justification exists.<sup>19</sup> The basic test, set forth in In re Cox, 3 Cal. 3d at 212, is whether the exclusion is "rationally related to the services and facilities performed." In Cox, the California Supreme Court decided that excluding the companion of a person with long hair and unconventional dress from public accommodations could not meet this test. See also Orloff v. Los Ange-

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<sup>19</sup>Applying this basic principle, California courts have permitted certain forms of discrimination based upon the reasonableness of the justifications for discrimination under the circumstances. See, e.g., Ross v. Forest Lawn Memorial Park, 153 Cal. App. 3d 988, 203 Cal. Rptr. 468 (1984) ("punk rockers" excluded from a private funeral at the request of the mother of the deceased); Wynn v. Monterey Club, 111 Cal. App. 3d 789, 796-98, 168 Cal. Rptr. 878 (1980) (compulsive gambler excluded from a gambling club).

les Turf Club, 36 Cal. 2d 734, 227 P.2d 449 (1951) (person with a reputation as a man of immoral character cannot be excluded from a race track); Stoumen v. Reilly, 37 Cal. 2d 713, 234 P.2d 969 (1951) (homosexuals cannot be excluded from a bar and restaurant).

There is nothing in the Act which prohibits the use of Rotary's "classification principle" to create an organization of diverse community leaders. The rationale for this principle is not "arbitrary." However, the policies of groups covered by the Act cannot be based on the blanket exclusion of women. Any given woman may be excluded based on the criteria established by the Rotary Club in question.

Although the basic prohibition in the Unruh Act against arbitrary discrimination may be difficult to apply in

some situations, such difficulties do not render the Unruh Act unconstitutionally vague. There is a substantial body of case law which shows the application of the Act in any given situation. See, e.g., Isbister v. Boys' Club of Santa Cruz, supra; Marina Point v. Wolfson, supra; In re Cox, supra.<sup>20</sup> International's real complaint is not that it can-

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<sup>20</sup>International makes an argument that the Act is vague because the exclusion of homosexuals is covered and the exclusion of the physically handicapped is not. [App. br. 41] However, the citation to Marsh v. Edwards Theatres Circuit, Inc., 64 Cal. App. 3d 881, 134 Cal. Rptr. 844 (1976), is disingenuous. The decision in Marsh was based on the fact that the California legislature had enacted legislation specifically addressing the rights of the handicapped which controlled and that the owner of a movie theater could not be compelled to make structural changes to his building which had been built in compliance with existing law at the time of its construction. Moreover, Marsh cannot be read as a blanket exclusion of physically handicapped persons from the coverage of the Unruh Act in other contexts.



not ascertain the application of the Act, but that the Unruh Act applies to it.

3. The term "business establishment" has a clear meaning under the Act and in case law.

Similarly, the Unruh Act's application to "business establishments of every kind whatsoever" does not render the Act unconstitutionally vague.<sup>21</sup> California has chosen to eliminate arbitrary discrimination in every form of organization to which the Unruh Act can

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<sup>21</sup>The California legislature specifically broadened the scope of the Act in response to court decisions which adopted an unduly restrictive view of its scope. In re Cox, supra; Isbister v. Boys' Club of Santa Cruz, Inc., supra.

reasonably and constitutionally be applied.<sup>22</sup>

The California courts have clearly expressed their willingness to apply the factors identified in Roberts to circumscribe the scope of the Act to avoid infringing on countervailing constitutional rights. They have recognized that the Unruh Act does not apply to "strictly private" clubs or institutions. Curran at 730-32 (emphasis in original). "We therefore conclude that the concept of organizational membership per se cannot place an entity outside the scope of the Unruh Act unless it is

<sup>22</sup>It should be noted that the trial judge on remand in Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), appeal dismissed 468 U.S. 1205 (1984) ruled that the scope of the Unruh Act was defined by the protections afforded for freedom of association under the Constitution. [See attached appendix, pp. 7-8.]

shown that the organization is truly private." Id. at 732. Thus, the California courts adhere to the teaching of this Court in Tillman, 410 U.S. at 439.

Although International contends that it should fall within this exemption--that it is "truly private--it can hardly take the position that it does not have reasonable notice that the Unruh Act applies to it. The California courts have held that large organizations, like the Boy Scouts, Curran v. Mount Diablo Council of Boy Scouts of America, supra, and Boys' Clubs, Isbister v. Boys' Club of Santa Cruz, Inc., supra, which play a prominent and influential role in the public life of our communities are covered by the term "business establishments" in the Unruh Act. That meaning is plain. These California precedents establish a constitu-

tional sanctuary for "truly private" associations--but not for large public service institutions which play a prominent and influential role in the life of the community.

C. The Unruh Act Is Not Unconstitutionally Overbroad.

International's overbreadth argument is similarly defective. The Unruh Act has never been applied to "strictly private" groups or to activities which qualify for protection under the First Amendment. A brief review of the cases International finds most offensive to its notion of freedom of association demonstrates this fact.

In O'Connor v. Village Green Owners Association, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983), the California Supreme Court held that a non-profit homeowners' association was

subject to the Unruh Act. Central to this decision was the court's view that the association operated very much like a profit-making business establishment in its management of the 629-unit condominium project which was the subject of the litigation. Although members of the court disagreed about the intended scope of the Unruh Act in these circumstances, no member of the court believed that First Amendment freedoms were in any way involved in the case.

Similarly, in Isbister, the First Amendment interests implicated by the operation of the recreational facilities at issue were minimal. The Boys' Club, as is true here, did not select its members on the basis of personal, cultural or religious affinity as a truly private club might do. Id. at 81. The only difference between the facilities

at issue in Isbister and recreational facilities run by a profit-making group was the non-commercial purpose animating the organizers and directors of the operation. Under the Unruh Act, as in Roberts, a "business establishment" need not have a profit-making motive.<sup>23</sup>

In Isbister, the California Supreme Court carefully evaluated the nature of the Boys' Club's First Amend-

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<sup>23</sup> International's use of Alcorn v. Anbro Engineering, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970), to suggest that the Unruh Act is limited to discrimination "in the course of furnishing goods, services or facilities to [an entity's] clients, patrons or customers" is odd. [App. br. 46]. This is clearly not the test that the California courts employ. Nor is it a test required by the constitution. Roberts, 468 U.S. at 625. See §IC, supra. Moreover, the primary point in Alcorn was that the Unruh Act did not apply to employment discrimination because the California legislature had enacted comprehensive legislation in that area. 2 Cal. 3d. at 500.



ment interests under the criteria established in Roberts, and held that the Boys' Club could be regulated under the principles of that case. 40 Cal. 3d at 85. The court of appeal made a similar analysis in this case. [J.S. App. C-33-38] See also, Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d at 729-32.

The California Supreme Court in Isbister further demonstrated its concern for safeguarding any countervailing First Amendment interests by indicating that "[w]e reserve judgment as to whether any organization or entity serving a substantial segment of the public on a non-selective basis is a 'business establishment' within the Act's meaning." Id. at 81, n.8. Thus, the Court has expressly reserved judgment on the California Court of Appeal's decision in

Curran, a case relied heavily upon by International.<sup>24</sup>

The Unruh Act does not regulate based upon the content of First Amendment expression. Indeed, as discussed in Section I B, supra, there is little, if any, "expression" involved in the activities of Rotary.

The Act is content-neutral in the scope of its coverage and in the acts it prohibits. The fact that the Act has a "bias" against any restriction of public access in "business establishments" [app. br. 47] is true but it is not evidence of a lack of neutrality for First

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<sup>24</sup>It should be noted that the claims in the Curran case involved allegations of substantial business activities on the part of the Boy Scouts of America. 147 Cal. App. 3d at 718-19. In any event, the California courts have yet to resolve the First Amendment claims asserted by the Boy Scouts in that case.

Amendment purposes. The Act is "biased" against sex discrimination and that "bias" is firmly established state policy in California.<sup>25</sup>

International's arguments express a strong dissatisfaction with the public policy of California. However, these arguments are not a serious attempt to apply the "overbreadth" precedents of this Court. Like the vagueness doctrine, the overbreadth doctrine is concerned with the chilling effect of statutes which threaten protected speech. This case involves no regulation of speech at

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<sup>25</sup>Nor does the unavailability of fees to successful Unruh Act defendants implicate any First Amendment interests, as International contends. [App. br. 42, 47]. There is no constitutional principle that requires civil rights plaintiffs and defendants to be treated identically with respect to fee awards. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

all. The case law under the Unruh Act does not demonstrate that the Act has been applied to conduct or expression protected by the First Amendment. There is no reason to believe that California courts will suddenly fail to consider First Amendment interests.

This Court has recognized that using the overbreadth doctrine is "manifestly, strong medicine" which should be "employed by the Court sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); see also, New York v. Ferber, 458 U.S. 747, 769 (1982). The doctrine has ordinarily been applied in the context of criminal statutes which by their terms reach, and thus "chill," protected expression. Thornhill v. Alabama, 310 U.S. 88 (1940).

Few state anti-discrimination statutes would survive scrutiny under the overbreadth test International proposes. Every application of such statutes involves a potential claim that a defendant is being compelled to come in contact with persons he would prefer to avoid. The "strong medicine" of the overbreadth doctrine is too potent to apply to the competing constitutional interests in this area.

The crucial question for overbreadth purposes is whether a statute reaches a substantial amount of constitutionally protected conduct. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494-95 (1982); Broadrick v. Oklahoma, 413 U.S. at 613. As demonstrated above, the Unruh Act does not. Indeed, there is no basis to believe the Act reaches any protected activi-

ties. As this Court emphasized in Broadrick, at 615-16:

[W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that [the statute in question] is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

The California courts have shown a willingness to construe the Unruh Act to avoid any constitutional difficulties. Even were it possible to hypothesize potentially unconstitutional applications of the Act, the same could be said for virtually any public accommodations law. Therefore, there is no basis for finding the Act unconstitutionally overbroad.



IV. CERTIORARI SHOULD NOT BE GRANTED.

There are no grounds for this Court to exercise its discretion by way of certiorari. If it does, it should deny the writ.

First, this case does not raise novel issues. Rather, it is controlled by the decision in Roberts v. United States Jaycees, 468 U.S. 609 (1984). See also Hishon v. King & Spalding, 467 U.S. 69 (1984).

Second, there is no conflict among the lower courts on the issues presented here.

Third, the record below does not support the questions International raises. International would like this Court to decide whether an asserted claim of freedom of association outweighs an individual's right to be free from discrimination under a state pub-

lic accommodations act. But, rather than claiming its own freedom of association, it is claiming that of clubs which are not parties to this lawsuit, including that of the Duarte club, which is the plaintiff.

International may not speak for the local clubs, and certainly not for Duarte. This is so not only because of the autonomy of the local clubs [J.A. 35] but also because no action has been taken nor threatened against them. They have not been injured. See Sierra Club v. Morton, 405 U.S 727, 739 (1972).

Accordingly, the case International argues is not before this Court and

it is not supported by a record.<sup>26</sup>

Aside from the few rules International imposes on the local clubs and evidence that Rotarians deduct their dues from their income tax returns, there is no evidence as to the actual practices of the local clubs or their members.

The trial court's order requires International to reinstate Duarte and enjoins it from enforcing its male-only policy against Duarte. See attached appendix pp. 1-2. No order of any kind was issued against Duarte nor any local club. Nor was any order issued "requir-[ing] the admission of females to all-

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<sup>26</sup>This Court should decline the invitation of amicus curiae Boy Scouts of America for the Court decide in this case whether it and/or its troops may be subject to a state's anti-discrimination statute.

male local Rotary clubs" as stated by International in its first Question Presented [at 1] and as argued by it throughout its brief.<sup>27</sup>

If a case involving a local club's denial of admission to a women should arise, it will then be time enough to consider the case in light of the facts pertaining to that club.

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<sup>27</sup>The statement by the court of appeal [J.S. App. C-27] that Duarte is a business establishment within the Unruh Act is not the judgment in this case. It was not necessary for the Court's decision. The statement is appropriately ignored because "[t]his Court . . . reviews judgments, not statements in opinions." Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956).

# CONCLUSION

The appeal should be dismissed or the decision below affirmed. Should the Court treat the jurisdictional statement as a Petition for Writ of Certiorari, the petition should be denied.

Respectfully submitted,

CAROL AGATE

Counsel of Record

SANFORD K. SMITH

BLANCHE C. BERSCH

PAUL HOFFMAN

FRED OKRAND

Attorneys for Appellees

January, 1987

## APPENDIX



(TITLE OF COURT AND CAUSE OMITTED)  
ORDER AND JUDGMENT ENTERED IN RESPONSE  
TO COURT OF APPEAL DECISION

WHEREAS the Court of Appeal issued an opinion herein on March 17, 1986 which is reported as Rotary Club of Duarte v. Board of Directors, 178 Cal.App.3d 1035; and WHEREAS the Court of Appeal directed this court to enter a new and different judgment in favor of Plaintiffs, 178 Cal.App.3d at 1067-1068;

NOW THEREFORE IT IS ORDERED AND  
ADJUDGED AS FOLLOWS:

FIRST. An injunction is hereby issued mandating the Board of Directors of Rotary International and Rotary District 530 to reinstate Rotary Club of Duarte's charter thereby reinstating it as a member of Rotary International and Rotary District 530. See 178 Cal.App.3d at 1067-1068.

SECOND. Rotary International and Rotary District 530 are permanently enjoined from enforcing or attempting to enforce its male-only membership restriction against Rotary Club of Duarte. See 178 Cal.App.3d at 1068.

THIRD. Nothing herein shall prevent, or can it prevent, Rotary International from adopting or attempting to enforce its membership rules or restrictions outside the State of California. See 178 Cal.App.3d at 1066.

Costs are awarded to plaintiffs in the sum of \$\_\_\_\_\_.

DATED: Sept. 16, 1986.

/s/ Max F. Deutz  
Max F. Deutz  
Judge of the Superior Court

MINUTE ORDER OF JULY 25, 1985  
HONORABLE P.G. BRECKENRIDGE, JR. JUDGE  
CASE NO. C365529  
TIMOTHY CURRAN VS. MOUNT DIABLO COUNCIL  
OF THE BOY SCOUTS OF AMERICA

Counsel for Plaintiff SLAFF, MOSK &  
RUDMAN

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AND ACLU FOUNDATION OF SOUTHERN  
CALIFORNIA

BY: PAUL L.  
HOFFMAN

Counsel for Defendant HUGHES HUBBARD  
& REED

BY: RONALD C.  
REDCAY AND

B. ERIN RUDERMAN

---

Motion of defendant-respondent Mount  
Diablo Council of the Boy Scouts of

America, for Summary Judgment, OR in the alternative, for summary adjudication of issue

(fourth cont.)

(TAKEN UNDER SUBMISSION

7-9-85 Dept. 82)

Motion of defendant-respondent for Summary Judgment, denied.

Motion for summary adjudication of issues granted, "Plaintiff-petitioner, Timothy Curran was not a member of the Boy Scouts of America on or immediately before November 28, 1980, and therefore was not expelled from membership in Boy Scouts of America." However, plaintiff is granted 30 days leave to amend to allege that he was "excluded" from membership. Plaintiff must file a complete second amended complaint/petition for Writ of Mandate. Defendant's previously filed answer

shall have the same force and effect as though filed responsively to such second amended complaint.

Motion of plaintiff-petitioner Timothy Curran for Summary Judgment, OR in the alternative, for summary adjudication of issues;

AND

Motion to amend complaint

(third cont)

(TAKEN UNDER SUBMISSION

7-9-85 Dept. 82)

Motion for summary judgment, denied.

Re plaintiff's motion for summary adjudication of issues:

1. Established as alleged by plaintiff as without substantial controversy:  
Nos. 16, 17, 19, 20, 21, 22, 26,  
27, 28, 29, 30, 31, 32;
2. Established as without substantial controversy, but as modified by the Court to conform to evidence:

- No. 14. Defendant has for several years operated a trading post of service in Walnut Creek where it sells a variety of items.
15. Sales at the trading post during 1983 grossed approximately \$57,000 or \$58,000, with a difference between gross sales and costs of approximately \$8,000.
18. In 1983, \$223,000 out of defendant's total revenues of \$759,000 came from United Way.
23. The Boy Scouts of America (BSA) licenses nationally approximately 2000 stores to sell uniforms, equipment, books, and other official scouting paraphernalia to scout membership

3. Issues still disputed

- a) 24, 25-(The Court has not been provided with Tarr deposition exhibits-however it appears that the defendant's objection to the terminology "net profit" is well taken.
- b) 35-In this regard, the Court is of the opinion that the Unruh Act does not apply to associations which are protected by the first and fourteenth amendments to the U.S. Constitution. There are issues of fact and disputes as to whether the defendant is a truly private organization within the criterion



expressed in Roberts v.  
U.S. Jaycees (1984) 104  
S.CT 3244. See defen-  
dant's response to issue  
number 34 and Alexander  
declaration.

Counsel for plaintiff to prepare and  
serve an attorney order.

A copy of this minute order is mailed to  
counsel as indicated above.

Supreme Court, U.S.  
**FILED**

**MAR 10 1987**

JOSEPH F. SPANIOL, JR.  
CLERK

21

No. 86-421

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

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BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

*Appellants,*

v.

ROTARY CLUB OF DUARTE, et al.,

*Appellees.*

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**Appeal from the Court of Appeal  
of the State of California  
Second Appellate District**

**APPELLANTS' REPLY BRIEF**

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No. 86-421

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

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BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

*Appellants,*

v.

ROTARY CLUB OF DUARTE, et al.,

*Appellees.*

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**Appeal from the Court of Appeal  
of the State of California  
Second Appellate District**

**APPELLANTS' REPLY BRIEF**

**ARGUMENT**

**I**

**Jurisdiction**

While appellees continue to assert that this Court has no jurisdiction over this appeal, it should be noted that this contention is not made by intervenor, State of California. California argues only that the case is controlled by the decision in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), so that "... no reason exists for this Court to devote its full attention to the merits of this appeal." [Intervenor's brief 4] California asserts: "The California Court of Appeal properly considered and rejected appellants' constitutional

objections to the application of Unruh to Rotary International's discriminatory membership practices." [Intervenor's brief 13] Obviously, since the Court of Appeal held Unruh applicable as against the contention that such application violated the First Amendment, this Court has jurisdiction under 28 U.S.C. § 1257(2). *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1979).

Appellants have consistently asserted their constitutional arguments, commencing in the trial court:

No existing case authority has applied . . . the Unruh Act to force an active and intimate fraternal organization such as Rotary to modify its membership preferences. To do so now would be to violate Rotary's constitutional rights to freedom of association. [Defendants' trial brief 17; Clerk's transcript 313]

Appellees' jurisdictional argument is nothing but a red herring; it should be summarily brushed aside.

Furthermore, the issues of vagueness and overbreadth (including extra-territorial impact) have been repeatedly presented for adjudication. At each stage, appellees presented opposing briefs. The mere failure of the Court of Appeal or the California Supreme Court to address either vagueness or overbreadth is insufficient reason for permitting an unconstitutional statute to stand.

## II

### Who Is Entitled to Constitutional Protection?

Reading the briefs of appellees, intervenor and their supporting *amici curiae*, one gets a curiously distorted view of the constitutional issue presented by this case. Such noted supporters of constitutional rights as the ACLU, the American Jewish Congress and the Anti-Defamation League of

B'nai B'rith are lined up to support, not appellants' First Amendment right to freedom of association, but appellees' claim that a state statute originally intended to eliminate discrimination in the marketplace entitles them to eviscerate such constitutional right. It must be remembered that this case involves no claim by appellees that *their* constitutional rights have been impinged by state action entitling them to relief under the Fourteenth Amendment. Rather, the sole issue presented is whether selective and exclusionary membership policies adhered to by local Rotary clubs are entitled to constitutional protection despite the claim that such policies may cause women to be disadvantaged. There is presented here a clash of asserted civil rights; appellees' rights, if any, stem from the Unruh Act, whereas appellants' are derived from the First Amendment. The question is, which are superior, and the question answers itself.

We have therefore repeatedly held that laws which actually affect the exercise of these vital [First Amendment] rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. [*United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967)]

Why, then, are appellants without supporters other than organizations which see their own First Amendment rights in jeopardy? Evidently, appellees and their *amici* adhere to the belief that the Constitution only protects the good guys and that male-only membership organizations are, *per se*, the bad guys. Thus, in virtually every brief filed in support of appellees' position, great stress is placed on a single quotation from the opinion of Chief Justice Burger in *Norwood v. Harrison*, 413 U.S. 455 (1973):

[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association *protected by the First Amendment*, but it has never been accorded *affirmative* constitutional protections. [413 U.S. at 469-470] [emphasis added]

What appellees fail to note is the fact that Chief Justice Burger recognized that private discrimination is *protected*; it may not, however, claim *affirmative* constitutional protection. The *affirmative* constitutional protection which was sought and denied in *Norwood* was the right to invoke the Equal Protection Clause to require state *support* in the form of free textbooks for a discriminatory private school. The key holding of *Norwood* is:

That the Constitution may *compel toleration* of private discrimination in some circumstances does not mean that it *requires state support* for such discrimination. [413 U.S. at 463] [emphasis added]

\* \* \*

[P]rivate bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State. [413 U.S. at 469]

Rotary clubs do not seek state support. Rather, they demand that California acknowledge that the First Amendment compels toleration of their associational freedom to select their members and to exclude women from membership if they so choose.

Furthermore, *Norwood* is a Thirteenth Amendment case. The Thirteenth Amendment permits Congress to prohibit even purely private discrimination against blacks.

*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). *Runyon v. McCrary*, 427 U.S. 160 (1976), also cited in virtually all of the opposing briefs, is also a Thirteenth Amendment case. Justice Stewart, speaking for the Court, explicitly recognized that the cases consolidated in *Runyon*:

... do not present any question of the right of a private social organization to limit its membership on racial or any other grounds. They do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. [427 U.S. at 167]

*Runyon* stands for no more than its holding:

Section 1981, as applied to the conduct at issue here, constitutes an exercise of federal legislative power under § 2 of the Thirteenth Amendment. . . . [427 U.S. at 179]

The Thirteenth Amendment is not implicated in the instant case and the right of a private social organization to limit its membership on gender or other grounds must be sustained under the First Amendment.

The American Jewish Congress evidently realizes the peril which lies in its assertion that Rotary clubs may be compelled to admit women, for it devotes several pages of its *amicus* brief to defending its exclusion of non-Jews from membership. Its membership is limited to persons of the Jewish faith who subscribe to its purpose and agree to abide by its Constitution, including "a commitment to the unity and creative survival of the Jewish people throughout the world." [AJC brief 36] AJC believes that their history of religious persecution has given Jews a "very special view" on issues of free exercise of religion and separation of church and state. Therefore, AJC asserts that to force it to admit



non-Jews would seriously impinge on its First Amendment rights. Appellants support AJC's associational rights. Appellants would, however, point out that, if an Armenian or an Untouchable claimed that his group's history of persecution caused him to support the same goals, exclusion of the *entire class* of non-Jews from membership, even on the accurate assumption that *most* non-Jews might have views colored by a different history, could not be justified under a statute like the Unruh Act.

Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply. [*Marina Point Ltd. v. Wolfson*, 30 Cal. 3d 721, 740, 640 P.2d 115, *cert. denied* 459 U.S. 858 (1982) quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) (italics omitted)]

Tinkering with First Amendment rights is a dangerous game. Appellants regret that the unpopularity of their position has cost them the support of groups normally in the forefront of the fight to sustain constitutional protections.<sup>1</sup> Nevertheless, as appellants pointed out in their Jurisdictional Statement (pp. 17-18, 22-23), the First Amendment is both color-blind and gender-blind. Freedom of association and the other rights protected by that amendment are protected whether the group invoking the Constitution is perceived as "good" or "bad", "right" or "wrong." Constitutional liberties are guarded regardless of whose ox is being gored.

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<sup>1</sup>See, e.g. the position taken by the ACLU in *Village of Skokie v. National Socialist Party of America*, 51 Ill. App. 3d 279, 366 N.E. 2d 347 (1977), *aff'd in part and rev'd in part*, 69 Ill. 2d 605, 373 N.E. 2d 21 (1978).



[A]s is true of all expressions of First Amendment Freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational. [*Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 124 (1981)]

The real thrust of the arguments of appellees and their *amici* is that *any* private club which excludes women deprives women of opportunities for business and social advancement which are afforded to the male members of such private clubs. Therefore, they reason, the private clubs must be characterized as business-oriented, not "strictly private," and the associational rights of the male members thereof must be denied in favor of the economic and social interests of the excluded women. The *amicus* brief filed by the California Women Lawyers, NOW and numerous other groups is explicit in this regard:

[E]xclusive clubs and organizations, like Rotary, afford their members unique opportunities for business contacts and business deals.

\* \* \*

Women need the informal contacts, networking, and professional support that membership in private clubs, such as Rotary International, offer. [NOW brief 6, 8]

Another *amicus*, the dissident Rotary Club of Seattle—International District [Seattle], asserts:

Any organization such as Rotary which provides significant business advantages to its members should be considered commercial, and therefore subject to rational state regulation to accomplish equality of advantage for all citizens, regardless of the organization's "official" statements of a noncommercial purpose. [Seattle brief 13]

That club, which, like Duarte, seeks to admit women in violation of its agreement to abide by the Constitution of Rotary International, asserts that there can be no constitutional right of intimate association unless an organization has a "wholly noncommercial purpose," and that the absence of such attribute disqualifies *any* organization from claiming constitutional protection for its membership policies. Going further, Seattle contends that a club cannot be regarded as noncommercial if *either* it has significant [not predominant] business purposes, *or* some of the members joined for their own business reasons. [Seattle brief 41-47] Since Seattle believes that this second test can be met by the simple expedient of filing self-serving Declarations of members who wish to compel the admission of women to membership, it is evident that all-male membership organizations soon will be eliminated. No wonder Seattle only grudgingly speculates that "there *may* be some kinds of organizations [utterly unspecified or defined] which states should not be allowed to require to admit women members . . . ." [Seattle brief 41] [emphasis added]

The furtherance of goals defined in terms such as "equality" may be viewed as laudable; particular forms of selectivity may be viewed as invidious discrimination; but if the individual liberties of citizens of this great land are to be preserved, the First Amendment and its protection of associational freedoms cannot be so easily destroyed.

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. [*Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)]

## III

**Local Rotary Clubs Are Private, Not Public  
and Are Entitled to Associational Freedom**

Undisputed facts led the trial court to find that Rotary clubs utilize the "classification principle" to provide a diversity of fellowship, to prevent clubs from being dominated by a few business segments of the community, and to encourage a broad awareness of community needs to be addressed by service activities. It also found that local clubs screen potential members for the integrity of their reputation in the business community, for their dedication to the service objectives of Rotary, and for their willingness and ability to abide by the rigorous attendance and participation standards of Rotary. These "principles of selectivity" caused the trial court to find as a fact that "Rotary membership is neither solicited from nor is it available to the public generally." [J. S. App. B-4-B-5] Although the Court of Appeal held that the Unruh Act compels the admission of women to local Rotary clubs, it, too, recognized that membership is not "open . . . to the entire public at large" and that Rotary has "'inclusive, not exclusive,' selective membership requirements." [J. S. App. C-2]

Nevertheless, appellees assert that there is no evidence that local Rotary clubs are selective. [Appellees' brief 68] Appellees stress that the Recommended Club By-Laws are not required to be adopted, but ignore the fact that membership qualifications found in Section 3 of Article 4 of the Constitution of Rotary International must be followed by all local clubs, and that almost all clubs adhere very closely to the basic steps recommended in the Manual of Procedure. [Pigman deposition, J. S. App. G-16-G-18] That a presumption of validity must be given to the trial court's

findings of fact is discussed in appellants' Jurisdictional Statement, page 9, n. 4.

Recently, the Court of Appeals for the Third Circuit had occasion to examine the nature of the Kiwanis organization, to which the trial judge in this case likened Rotary, and which has been the subject of analysis in *Roberts* and in *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis*, 41 N.Y.2d 1034, 363 N.E.2d 1378, cert. den. 434 U.S. 859 (1977). In *Kiwanis International v. Ridgewood Kiwanis Club*, 806 F.2d 468 (3d Cir. 1986), rev'g 627 F.Supp. 1381 (D.N.J. 1986), as here, those asserting that a state statute compelled the admission of women to a local Kiwanis club contended that the attributes of Kiwanis International, rather than those of the local club, should be examined. While the Third Circuit did not reach the constitutional issues presented here, it held that the question before it was whether the local club, not the International organization, was "private" rather than "public". Focusing on the size of the club in question (28 members), national membership requirements, and local screening procedures, the Court concluded that there was not an "open and unrestricted invitation to the community at large to join Kiwanis Ridgewood." [806 F.2d at 476] The Kiwanis club was held to be private; local Rotary clubs are entitled to the same classification.

In their zeal to assert the perceived interests of women, appellees, intervenor State of California, their *amici* and the California Court of Appeal all focus on what they see as substantial business benefits to be derived from membership in Rotary. They enthusiastically point to the acknowledged fact that obtaining business benefits was an original purpose in the formation of Rotary. However, they choose to dismiss with evident disbelief the uncontroverted fact that it has been the policy of Rotary for over 50 years that membership

is not to be used for personal commercial advantage. [1981 Manual of Procedure, p. 154; Rotary Basic Library, Focus on Rotary, vol. 1, pp. 2, 68; Pigman deposition, J. S. App. G-34—G-37] While it is, of course, true that business relations conferences sponsored by Rotary clubs are of advantage to Rotarians in attendance, an equally important aspect of such conferences is that they spread the ideal of Rotary to the business community. [J. A. 14] Vocational Service is one of the avenues of service pursued by Rotarians. It is directly related to Rotary's classification principle and is intended to "create understanding within and between the various occupations in the community and insure improved ethical and practical relations among them." [J. A. 22] Rendering such service "is a personal obligation incurred by every Rotarian. In filling a classification, he becomes *the* representative of his vocation in that community." [*Id.*] Vocational Service is "simply a way of applying the concept of Rotary's ideal of service to business and the professions." [J. A. 23] Thus, the classification principle serves as means of furthering Rotary's goal of service; it is not, as appellees assert without factual foundation, a means of protecting the classification holder's monopoly over beneficial business contacts. [Appellees' brief 60]

Appellants do not deny that membership in a local Rotary club, with the camaraderie and friendship that there develop among the members, may produce some business benefits. This is natural and normal and is true of all private clubs, if their members are engaged in business. Who would not rather do business with a friend? But the trial court found as a fact, and it is supported by substantial evidence, that "business benefits are incidental to the principal purposes of the association which are to promote fellowship for *non-commercial*, and *non-economic* objectives and to secure the voluntary uncompensated participation of business



and professional men in the aforesaid 'service' activities." [J. S. App. B-3]

The very recent decision of the New York Court of Appeals in *New York State Club Association v. City of New York*, No. 1, slip. op. (N.Y. Ct. App. Feb. 17, 1987), does not support application of the Unruh Act in derogation of Rotarians' associational rights. The law there under scrutiny, unlike the Unruh Act, applied only to clubs which "provide benefits to business entities and to persons *other than their own members*, thereby assuming a sufficient public character that they should forfeit the 'distinctly private' exemption of the City's Human Rights Law." *Id.* at 1-2 (emphasis added). The court held that it is not unreasonable to determine that a large club which receives substantial business-related income from non-members cannot be selective in its membership and use of its facilities. *Id.* at 10. There is no evidence that local Rotary clubs, with an average membership of 46, derive *any* business-related income from non-members by regularly receiving "payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business," as required by the New York law. Further, the New York court's discussion of the First Amendment freedoms of intimate and expressive association is both cursory and superficial. It provides no guidance here.

Further evidencing the private nature of local Rotary clubs is the fact that while joint meetings with other service clubs on "specific occasions" are permitted, local clubs are directed not to hold their weekly meetings jointly with such clubs. [1981 Manual of Procedure, p. 36] Moreover, although Rotary has sponsored groups of young people of both sexes in clubs under the names Interact and Rotoract, such clubs are in no sense to be considered part of or as legal

affiliates of the sponsoring Rotary club or of Rotary International, and the members thereof are not to be called or considered as "junior Rotarians," nor may they use or wear the Rotary emblem. [1981 Manual of Procedure, pp. 194, 199] Similarly, women's clubs or similar organizations of women relatives of Rotarians are not formally recognized, nor may they use the Rotary name, emblem, Directory or any official Rotary gathering. Women's classification clubs composed of business and professional women may not become member clubs of Rotary International and participate in its conventions and other forms of administration. [1981 Manual of Procedure pp. 155-156] Local groups of women organized "separately" from Rotary and having among their objectives the support of Rotary club activities are, however, not discouraged. [1981 Manual of Procedure, p. 156]

Finally, although local Rotary clubs commonly meet in public restaurants, this is irrelevant to the primary consideration, which is not *where* the gathering takes place, but "whether the invitation to gather is open to the public at large." *Kiwanis International v. Ridgewood Kiwanis Club*, 806 F.2d at 474. *See also Kiwanis Club of Great Neck v. Board of Trustees of Kiwanis International*, 41 N.Y.2d at 1034:

Although the Kiwanis Clubs' community-oriented activities may extend into the public sphere, the intrusion indicated on this record is not so extensive, or of the quality, as to permit governmental supervision of *essentially private activity in the constitutional sense*. [emphasis added]

Twenty years ago, a California appellate court recognized the principle which must govern this case:



The right of adults freely to join together socially and to assemble for lawful purpose may be conceded to include the right to form and maintain clubs, secret or nonsecret, the right to be as snobbish as they choose, and any attempt at interference with that right by legislative or administrative mandate may well be said to be arbitrary, unreasonable and therefore in violation of the First Amendment. [*Robinson v. Sacramento City Unified School District*, 245 Cal. App.2d 278, 291 (1966)]

While the views of the California courts have changed over the years, the values inherent in the protection afforded by the First Amendment remain the same. They must be safeguarded in this case.

#### IV

#### Freedom of Expressive Association Is at Stake Here

A key issue presented by this case, and one which cannot be lightly dismissed, is that of Rotarians' freedom of expressive association. By their democratically established rules, males who comprise the membership of local Rotary clubs have decided that women shall play no formal role in the service activities which are the *raison d'être* of Rotary. While separately organized groups of women who support Rotary's goals are not discouraged, women have no official status in the Rotary organization. Their absence has not gone unnoticed; clubs other than Duarte and Seattle have sought the admission of women and have proposed the necessary change to the Rotary Constitution. Such a change was defeated in 1972, 1977, 1980, 1983 and 1986. To this day, the vast majority of Rotarians worldwide believe that, as the trial court found, "the continued successful worldwide operation of Rotary is materially dependent on a delicate

balance of divergent attitudes in diverse cultures," [J.S. App. B-7] and they do not wish women to be admitted into membership. Significantly, Duarte's appeal from its suspension was rejected by a vote of 1060-34. [Clerk's transcript 217 FFF]

As the trial court found, the male-only membership policy of Rotary is a "fundamental and broadly accepted principle of Rotarian operation," and is cherished by the members both for the "quality of fellowship" which it provides and because of its enabling Rotary to "operate effectively over a worldwide base of varied cultures and social mores." [J.S. App. B-5—B-6]

In *Griswold v. Connecticut*, this Court established the governing principle:

The right of "association," like the right of belief . . . is more than the right to attend a meeting; *it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion;* and while it is not expressly included in the First Amendment *its existence is necessary in making the express guarantees fully meaningful.* [381 U.S. 479, 483 (1965) (citation omitted)] [emphasis added]

While the expression of a Rotarian's attitude through his decision to join and participate in an all-male service club may be viewed by some as outmoded at best and sexist at worst, it is nonetheless entitled to constitutional protection in the absence of a compelling state interest in preventing "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages" such as were found to exist in *Roberts*, but which are absent here.

Yet, in an era where the term "women's liberation" has become a battle-cry, there are those who would reject such freedom of association as unworthy.<sup>2</sup> Recently, a federal court, looking at the all-male membership policy of Kiwanis, stated the question for decision as follows:

... the matter to be determined is whether an organization which purports to—and indeed does—embody and encourage the most communitarian and charitable of social activities should be permitted to *impart the message* that simply because one is female she is rightfully prohibited from functioning as a decisionmaker of full stature in a structuring of such activities. [*Kiwanis International v. Ridgewood Kiwanis Club*, 627 F.Supp 1381, 1389 (D. N.J. 1986), *rev'd* 806 F.2d 468 (3d Cir. 1986)] [emphasis added]

The trial court held that the freedom of expressive association of members of local Kiwanis clubs could be overridden by a state statute compelling admission of women to membership. While the Court of Appeals reversed, it did not find it necessary to address this constitutional issue. The issue is directly involved in the present case, however, since the California Court of Appeal found a compelling state interest in denying to Rotarians the right of all-male expressive association even though such expression was not found to have caused any tangible economic harm. [J.S. App. C-

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<sup>2</sup> Of course, not all women believe that single-sex clubs are invidiously discriminatory, nor do they feel that their desires for the rendition of public service cannot be achieved but through membership in all-male organizations such as Rotary. *See amicus* brief filed by Pilot Club International, Soroptimist International of the Americas, Inc. and Zonta International, a group of all-female service clubs.

31—C-33] The holding here and that of the lower *Kiwanis* court should be expressly repudiated.

For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, *or to the truth, popularity, or social utility of the ideas and beliefs which are offered.* [*NAACP v. Button*, 371 U.S. 415, 444-445 (1963)] [emphasis added]

Indeed, even a group which lacks a cohesive philosophy is entitled to define the terms on which one can become a member. In his dissenting opinion in *Democratic Party of United States v. Wisconsin*, 450 U.S. at 131, Justice Powell noted that "the Democratic Party, however, is not organized around the achievement of defined ideological goals. Instead, the major parties in this country 'have been characterized by a fluidity and overlap of philosophy and membership.' " (citation omitted) Nevertheless, the Court held that a statute regulating the terms on which a citizen may become a member of the Party's nominating convention violated the Party's associational rights.

## V

### An Additional Word about Vagueness and Overbreadth

In *Britt v. Superior Court*, 20 Cal. 3d 844, 855, 574 P.2d 766 (1978), the California Supreme Court recognized that "private association affiliations and activities . . . are presumptively immune" from state regulation. And, in *Marin County Board of Realtors v. Palsson*, 16 Cal. 3d 920, 938, 549 P.2d 833 (1976), the California Supreme Court conceded: "It has never been the law in California that a voluntary association may be forced to open its membership

rolls to all who apply." The court said that only when membership in an association is a "practical economic necessity" will the basis for exclusion be subject to court scrutiny. The plaintiff-by-plaintiff common law remedy applied in that case represents a rule of law that is congruent with any compelling state interest for ensuring access to significant economic opportunity. No such interest has been shown by California to apply the extremely broad remedies of the Unruh Act to curtail freedom of association in other situations. However, the Court of Appeal in this case held that "International and Duarte are business establishments and as such they are prohibited from discriminating against members and potential members on the basis of sex", without regard to proof of *any* actual economic injury to the plaintiffs. [J. S. App. C-31—C-33]

Now we find the State of California asserting: "Necessarily, a conclusion that an organization is a business within the meaning of the Unruh Act entails a conclusion that it is not the sort of organization which may assert a constitutional right of intimate association." [California *amicus* brief in support of Motion to Dismiss, p. 7] California also contends that a business, within the meaning of the Unruh Act, encompasses not only "places of public accommodation," but also all "groups with 'sufficient businesslike attributes' " and "enterprises 'affected with a public interest.' " [Intervenor's brief 32-36]

Indeed, California argues that "assertions of constitutional protection for discriminatory membership and guest policies of truly private clubs have been rejected. . . ." [California *amicus* brief 10] This attitude of the State of California, like the expansive recent holdings of the California courts discussed in appellants' original brief, utterly ignores the direction of this Court that "precision of regulation"



must be the touchstone where First Amendment freedoms are involved. *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

Moreover, appellees and the State of California virtually ignore the unconstitutional uncertainty occasioned by the inconsistency of the decision here with prevailing California rules governing private interstate associations domiciled outside California. See *Signal Oil & Gas Co. v. Ashland Oil & Refining Co.*, 49 Cal. 2d 764, 774, 322 P.2d 1 (1958); *American Center, etc. v. Caverner*, 80 Cal. App. 3d 476, 485 (1978).

It is regrettable that the California Supreme Court did not see fit to review the decision of the Court of Appeal in this case. Refusal to grant a hearing is not to be deemed an acquiescence in the law as enunciated by a Court of Appeal and must not be deemed a *sub silentio* overruling of prior Supreme Court decisions. *People v. Triggs*, 8 Cal. 3d 884, 890, 506 P.2d 232 (1973). The decision of the Court of Appeals is clearly at odds with *Britt* and *Marin County Board of Realtors*. At the same time, it is arguably supported by other recent California decisions of extreme breadth. The situation is intolerable. The proper outlines of the Unruh Act are so vague as to be invisible; its outer limits cannot be discerned. As viewed by the State of California and the Court of Appeal in this case, it is unconstitutional under any test for vagueness or overbreadth.

### Conclusion

If the Constitution exists to get "government off the backs of people," [*Schneider v. Smith*, 390 U.S. 17, 25 (1968)], no better place can be found for it to be utilized than in protecting the right of club members to determine who may join with them in exercising "the attributes of self-government and member-ownership traditionally associated with private clubs." *Daniel v. Paul*, 395 U.S. 298, 301 (1969).

Respectfully submitted,

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1986

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BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

Appellants,

v.

ROTARY CLUB OF DUARTE, et al.,

Appellees.

\_\_\_\_o\_\_\_\_

Appeal from the Court of Appeal  
of the State of California  
Second Appellate District

MOTION OF THE STATE OF CALIFORNIA  
FOR LEAVE TO INTERVENE AS OF RIGHT

\_\_\_\_o\_\_\_\_

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MOTION OF THE STATE OF CALIFORNIA  
FOR LEAVE TO INTERVENE AS OF RIGHT

Pursuant to 28 United States Code section 2403(b), the State of California moves this Court for permission to intervene as of right to defend the constitutionality of a California statute. At issue in this case is the constitutionality of California Civil Code sections 51 and 52, the Unruh Civil Rights Act, which appellants Board of Directors of Rotary International, et al. contend is vague and overbroad, in violation of First Amendment associational rights.

As provided in 28 United States Code section 2403(b):



"In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene . . . for argument on the question of constitutionality."

Rule 28.4(c) of the Supreme Court Rules implements this right to intervene where, as here, cases have proceeded to this Court through state courts, and the state whose statute is drawn into question has not been a party.

Under 28 United States Code section 2403(b), states may intervene as of right in this Court when this Court is the first federal court to consider constitutional challenges to a state statute. (*Estate of Thornton v. Caldor, Inc.*, \_\_\_ U.S. \_\_\_, 86 L.Ed.2d 557, 562 n. 7 [105 S.Ct. 2914] (1985); and *R. Stern, E. Gressman and S. Shapiro*, § 6.16, p. 342 (6th ed. 1986).) As explained most recently in *Maine v. Taylor*, \_\_\_ U.S. \_\_\_, 91 L.Ed.2d 110, 120 [106 S.Ct. 2440], "a State clearly has a legitimate interest in the continued enforceability of its own statutes . . . ."

In the instant case, the State of California did not participate below, as California's Unruh Civil Rights Act permits private parties to litigate allegations of violations. However, now that appellants are asking this Court to find the statute unconstitutionally vague and overbroad, the State of





California, through its Attorney General John K. Van de Kamp, wishes to exercise its right to "intervene and participate in the written and oral arguments before the Court." (R. Stern, et al., supra, at 342.)

For the foregoing reasons, this petition for leave to intervene as of right should be granted.

DATED: DEC 3, 1986

Respectfully submitted,

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of the State of California  
ANDREA SHERIDAN ORDIN  
Chief Assistant Attorney General

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Counsel for State of California

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BEST A

CERTIFICATE OF SERVICE

I, Marian M. Johnston, a member of the bar of this Court, hereby certify, pursuant to rule 28.3 of the Rules of this Court, that on December 2, 1986, I have made service by mail, first class postage prepaid, of copies of this Motion of State of California for Leave to Intervene As of Right, on the following counsel of record for all parties herein, and that all parties required to be served have been served:

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**DEC 18 1986**

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CLERK

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No. 86-421

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, *et al.*,  
*Appellants,*

v.

ROTARY CLUB OF DUARTE, *et al.*,  
*Appellees.*

---

**Appeal from the Court of Appeal of the State of  
California, Second Appellate District**

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**BRIEF OF THE AMICUS CURIAE IN SUPPORT OF  
APPELLANTS BY THE CONFERENCE OF PRIVATE  
ORGANIZATIONS**

---

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The Conference of Private Organizations respectfully submits this brief as *amicus curiae* in support of the appellants, the Board of Directors of Rotary International, et al.

### INTEREST OF AMICUS

The Conference of Private Organizations ("CONPOR") is a coalition of national, private membership organizations.<sup>1</sup> CONPOR was formed in order to defend and protect the fundamental rights of its members, and citizens generally, to associate freely and privately upon such terms as they shall solely determine. CONPOR promotes this right by participating in judicial cases, providing information to legislative and administrative officials, and conducting educational activities.

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<sup>1</sup> The following organizations are members of CONPOR: the Benevolent and Protective Order of Elks, a benevolent, ritualistic, and fraternal society that charters approximately 2,250 lodges, which have approximately 1,650,000 members; the Loyal Order of Moose, a benevolent, ritualistic, and fraternal society that charters approximately 2,250 lodges, which have approximately 1,300,000 members; the Great Council of U.S. Improved Order of Red Men, a benevolent, ritualistic, and fraternal society that charters approximately 940 local lodges, which have approximately 53,616 members; Kiwanis International, a social and service organization that charters approximately 8,200 local Kiwanis clubs with approximately 313,000 individual members; the National Club Association, whose membership consists of over 1,000 private social clubs which have 1,000,000 individual members; the National Association of American Business Clubs, whose membership consists of 136 private clubs, which have over 6,600 individual members; and the United States Power Squadrons, whose membership consists of 450 local groups, which have over 50,000 members.

CONPOR's interest in this case arises from the diversity of membership requirements, limitations, and restrictions of the organizations which it represents. Some of these organizations limit their membership primarily on the basis of broad, objective classifications such as gender, age, religious belief, or literacy. Others rely primarily on subjective membership qualifications such as congeniality, avocation, social status, or economic status. Most employ both types of restrictions to one degree or another. CONPOR believes that the constitutional right of association protects the right of its membership associations to be selective in their core membership functions—voting, holding office, and making policy—on the basis of either broad, objective classifications such as gender, or on the basis of subjective factors such as congeniality, social status, or the like. Each of these membership policies represents a choice that is within the discretion of the group's members and may not be subject to government control.

All of the associations CONPOR represents contribute to the unique pluralism and diversity of our country. Because the decision of the Court of Appeal in the instant case threatens the constitutional rights of these private organizations, CONPOR believes this Court should reverse that decision.

### **SUMMARY OF ARGUMENT**

This case does not call upon the Court to decide whether Rotary clubs should reconsider their current membership policy and decide to admit women. Nor does it call upon the Court to decide whether Rotary International, an organization whose members are local Rotary clubs, qualifies for constitutional protec-

tion. The question in this case is whether the State of California may interfere with the membership decision of men who join together in selective, small, congenial groups to render service in fellowship with one another.

In light of the factors the Court discussed in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the answer to that question must be no. The Jaycees does not follow a truly selective membership admission policy, admitting virtually all male applicants between the ages of 18 and 36. It actively recruits new members on the local, regional, and national levels. It is a large organization that is controlled at the national level. In addition, the Jaycees admit non-members to many of the functions central to the decision of its members to join the organization. Given these characteristics, it is obvious that the Jaycees falls well outside the boundaries of the constitutional protection of intimate association.

Rotary clubs, on the other hand, are selective, small, and governed by local members. Rotary meetings are private, and the only way to be admitted to the membership of a club is by invitation after a careful screening process. Rotary clubs exist so their members can render community service in fellowship with one another. There is an explicit policy against using membership for commercial advantage. These characteristics of Rotary clubs indicate that their members have a constitutionally protected freedom of intimate association.

In its attempt to extend to Rotary clubs the Unruh Act's<sup>2</sup> prohibition of discrimination in business estab-

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<sup>2</sup> The Unruh Act, Cal. Civil Code §51 (West 1982), says:

lishments, the Court of Appeal of the State of California has violated this constitutional right. In addition, the Court of Appeal has forced many members of Rotary clubs to be associated with a viewpoint to which they object—a violation of the First Amendment. It has also forced these Rotary members to choose between their right of free speech and their right of intimate association. If our constitutional rights mean anything, then the State may not force such a choice on its citizens. Because of these violations of Rotary members' constitutional rights, the Court should reverse the decision of the Court of Appeal of the State of California.

### ARGUMENT

#### **I. CALIFORNIA MAY NOT INTERFERE WITH THE MEMBERSHIP DECISIONS OF ROTARY CLUBS BECAUSE THE CONSTITUTION PROTECTS ROTARY MEMBERS' CHOICES OF THEIR INTIMATE ASSOCIATES.**

The Constitution protects local Rotary clubs from undue intrusion by the State, because those clubs are congenial, small and selective in their membership decisions. Like the members of many other private organizations, Rotary members join with other people of their choosing for fellowship and to serve society. Rotary clubs restrict their membership to men, in part because the fellowship that develops among a

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"All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."



group of men who meet regularly enables them to serve the community more effectively. Pigman deposition, App. to Jur. Statement G44. Relationships such as these safeguard "the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). Accordingly, the Court should protect the right of Rotary members to choose the people with whom they enter into such relationships "as a fundamental element of personal liberty." 468 U.S. at 618.

In *Roberts*, the Court listed factors to determine how much the Constitution protects the membership decisions of private groups. These factors include "size, purpose, policies, selectivity, [and] congeniality," with no single factor being determinative. 468 U.S. at 620. The Court did not have to mark the boundaries of constitutional protection in *Roberts* in order to conclude that the Jaycees' membership decisions are not protected. Whatever these boundaries are, it is clear that the Jaycees have been held to fall outside them. 468 U.S. at 620. Rotary clubs, however, as well as many other private organizations, fall within these boundaries.<sup>3</sup>

In contrast to the California Court of Appeal, which focused its analysis in this case on Rotary International, this Court in *Roberts* focused on the local Jaycees chapters involved in the case. Those local chapters were large and basically unselective groups.

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<sup>3</sup> CONPOR notes that the criterion of organizational "size" is imprecise and leaves several major questions unanswered (e.g., what is the effect of organizational subgroups of differing sizes within an organization). Whatever the resolution of these factors, however, Rotary clubs clearly satisfy any size criterion.



Age and gender were the only membership criteria used at the local and national levels, and the Jaycees admitted women as associate members. Furthermore, people of both genders who were not members of the Jaycees often participated in activities central to the decision of many members to associate with one another, including awards ceremonies, community programs, and recruitment meetings. 468 U.S. at 621.

Local Rotary clubs are different. The primary purpose of Rotary is to encourage fellowship and service among men who are representative of the local community. 1 Rotary Basic Library, Focus on Rotary 1-2. An individual Rotary member belongs to a local Rotary club. These clubs, not their individual members, are members of Rotary International. In 1982, the average membership of a local club was forty-six. See *Rotary Club of Duarte v. Board of Directors of Rotary Int'l*, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213, 216 (1986).

Membership in Rotary clubs is by invitation only and is highly selective. Rotary clubs use a classification system of businesses and professions. An active member must be in a leadership position in the business or profession in which he is classified, and the number of members in each classification is limited. 1 Rotary Basic Library, Focus on Rotary 1-2, 67; *Rotary*, 224 Cal. Rptr. at 217; Pigman deposition, App. to Jur. Statement G49. Rotary club meetings are not open to the public, and joint meetings with other service clubs are discouraged. In fact, Rotary members are urged not to belong to other service clubs. Women's clubs may not use the Rotary name or become members of Rotary International. 1 Rotary Basic Library, Focus on Rotary 67-68; Pigman dep-

osition, App. to Jur. Statement G25; 1981 Manual of Procedure, 135, 155-56.

In order for someone to become a member of a Rotary club, the club's membership committee or an active, senior active, or past active member must submit his name to the club's board of directors. The board forwards the nomination to the club's classification and membership committees. The former determines that the club has an open classification that accurately describes the nominee's business or profession. The membership committee evaluates the nominee's character, business and social standing, and general eligibility. To avoid embarrassment, the nominee's name is kept confidential during these preliminary evaluations, and the nominee is not informed of the investigations. If both committees return favorable reports and the board approves them, all the members of the club receive notice of the nominee's name and business. If no one objects within ten days, the nominee becomes a member. If there is an objection, the board of directors may vote to admit the nominee to membership. 2 Rotary Basic Library, Club Service 15.

One factor that influenced the Court's decision in *Roberts* was the control the Jaycees national headquarters exercised over local Jaycees chapters. See *Roberts*, 468 U.S. at 613-14. Rotary International does not exercise such control over local Rotary clubs. Each local club is run by its board of directors, which the members elect. 1 Rotary Basic Library, Focus on Rotary on 70.

Another important factor in the *Roberts* decision was the conclusion of the Minnesota Supreme Court, which this Court accepted, that the Jaycees organi-

zation was a business that sold goods and extended privileges in exchange for annual membership dues. *Roberts*, 468 U.S. at 616. The same cannot be said of Rotary clubs.

Those who are in favor of government forcing private clubs to admit women make much of the claim that membership in an organization like Rotary bestows business benefits so indispensable to careers that membership must be made available to all. See e.g., *Rotary*, 224 Cal. Rptr. at 224-25. This allegation, however, is not supported by either facts or logic. It rests either on the perception that members of private organizations must receive some business benefit, or on the statements of a few members that suggest they joined the organization to obtain such a benefit. See *Rotary*, 224 Cal. Rptr. at 225-26. Neither is a sound basis for this Court or any court to render a decision, especially when the decision may infringe upon constitutional rights. It is a fact, not mere conjecture, that Rotary clubs do not exist to bestow commercial benefits on their members; they exist for those members to render service in fellowship with one another. The fallacy of this allegation of an indispensable nexus between organizational membership and vital career or business benefits is revealed when it is considered that nothing happens at a Rotary club (or other private organization) that is not replicated daily at a myriad of other unselective establishments, locations, or groups, and that membership in a Rotary club does not provide access to the conversations, or discussions, of other members.

When the Court applies the *Roberts* factors to Rotary clubs, it must conclude that the Constitution protects Rotary members' choices of intimate associates

from interference by the State. In *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974), the Court held that the actions the State may take against groups with selective memberships is very limited, even if these groups discriminate on the basis of race. Specifically, the Court concluded that the State may not exclude such a group from a public park merely because it has an "all-Negro, all-Oriental, or all-white" membership policy. 417 U.S. at 575. The Court quoted with approval the dissenting opinion of Justice William O. Douglas joined by Justice Thurgood Marshall (417 U.S. at 575) in *Moose Lodge No. 107 v. Irvis*:

My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permits all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

407 U.S. 163, 179-80 (1972) (footnote omitted). Justice Blackmun in *Gilmore* explained why freedom of association should protect groups that restrict their membership:

The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and ensures peaceful orderly change.

*Gilmore*, 417 U.S. at 575.

The Court should extend to Rotary clubs the protection it describes in *Roberts*: "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. *E.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)." *Roberts*, 468 U.S. at 618. Such relationships qualify for constitutional protection because they cultivate shared ideals and beliefs, thus acting as buffers between the individual and the power of the State. See *e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (freedom to marry is a fundamental personal liberty); <sup>4</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion) (right of extended family to live together is constitutionally protected); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1973) (right of Amish parents to dictate education of their children according to their beliefs is constitutionally protected); *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965) (state interference in procreative choices is unconstitutional); *Pierce v. Society of Sisters*, 268 U.S. at 535

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<sup>4</sup> See also *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).



(state may not prohibit parents from educating their children in private schools). See also *Gilmore v. City of Montgomery*, 417 U.S. at 575; *NAACP v. Alabama*, 357 U.S. 449, 460-62 (1958).

The Court also recognized that it should afford constitutional protection to intimate relations because people derive much of their emotional enrichment from close ties with others and "[p]rotecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977); *Carey v. Population Services International*, 431 U.S. 678, 684-686 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)." *Roberts*, 468 U.S. at 619. The Court should ensure that Rotary clubs receive the same constitutional protection, because their members share ideals and seek to form close relationships with one another.

The factors announced in *Roberts* indicate that the Court should protect Rotary clubs from California's interference in their membership decisions. Rotary clubs choose their members carefully from a limited group of people—leaders in business and in the professions. The clubs are small in size and governed by their own members. Rotary members come together to render community service in fellowship with one another, not to bestow commercial benefits on one another. They have decided to limit their mem-

bership to men because the unique bonds of fellowship they develop enrich their lives and enable them to serve their communities more effectively. Rotary members do not seek the Court's approval of their membership decisions. They ask the Court only to affirm that the Constitution protects those decisions from interference by the State. In light of its past decisions, the Court should heed that request and reverse the decision of the Court of Appeal of the State of California.

**II. BY FORCING ROTARY CLUBS TO ADMIT WOMEN, CALIFORNIA HAS UNCONSTITUTIONALLY COMPELLED ROTARY MEMBERS TO BE ASSOCIATED WITH A VIEWPOINT TO WHICH THEY OBJECT AND TO CHOOSE BETWEEN THEIR FREEDOM OF INTIMATE ASSOCIATION AND THEIR FREEDOM OF SPEECH.**

As this lawsuit indicates, most Rotary members do not want to admit women to their clubs. Proposals to change the rule that limits membership to men were defeated in 1972, 1977, and 1980. Pigman deposition, App. to Jur. Statement G41-G42. Nevertheless, the State of California has forced Rotary clubs within its boundaries to admit women as members. In doing so, it has violated the Constitution by requiring many Rotary members to make a hard choice: they must either leave their Rotary clubs, where they may have been members for many years, or they must run the risk that someone will associate them with a position to which they object—i.e., that women should be members of Rotary clubs. In other words, these Rotary members must choose between their freedom of intimate association and their freedom of speech.



“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (Burger, C.J.). See also *Pacific Gas and Electric Co. v. Public Utilities Comm’n*, 54 U.S.L.W. 4149 (1986) (unconstitutional for a state to require a utility to distribute in its billing envelopes literature with which it disagrees); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (statute that required newspapers to publish replies of candidates whom they had criticized held unconstitutional); *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 633-34, 642 (1943) (compulsory flag salute held unconstitutional). In *Wooley*, the Court held that New Hampshire could not prosecute Jehovah’s Witnesses for covering the state motto, “Live Free or Die,” on their automobile license plates. The Jehovah’s Witnesses objected to the slogan on political, religious, and moral grounds. The Court held that government could not force the Jehovah’s Witnesses to be the instrument for a message they found unacceptable. “In doing so, the State ‘invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.’ ” *Wooley*, 430 U.S. at 715 (quoting *Barnette*, 319 U.S. at 624).

The decision of the California Court of Appeal puts many Rotary members in the same position as the Jehovah’s Witnesses in *Wooley*. Until recently, these Rotary members belonged to a group of men. They invested time, money, and energy over the years to develop the reputation the Rotary name and identifying insignia convey to the public. The Rotary mem-

bership criteria are part of that reputation, including the gender restriction. Now, however, when Rotary members attend their local club meetings, wear a Rotary shirt, or do anything else connected with Rotary, some people may believe they favor admitting women to Rotary clubs. Many Rotary members do not agree with that position and do not want to be associated with it.

Most people who saw New Hampshire's motto on the Jehovah's Witnesses' license plates probably would not have assumed the Jehovah's Witnesses advocated or even accepted the philosophy of the motto. Nevertheless, the Court in *Wooley* found it sufficient that some person might connect them with the message they found unacceptable. See 430 U.S. at 715. Similarly, most people probably would not assume that a Rotary member advocates admitting women simply because he wears the same Rotary symbol that members of the Rotary Club of Duarte wear. All that *Wooley* requires, however, is that some person might make that assumption.

Rotary members might be able to reduce the risk of association with the objectionable viewpoint by publishing a disclaimer, but that is also inadequate under *Wooley*. The Court implicitly rejected the argument that the Jehovah's Witnesses could put a disclaimer next to the license plate. See 430 U.S. 714-15. Likewise, in *Pacific Gas and Electric Co.*, the Court rejected the argument that the utility would receive adequate First Amendment protection if authors of opposing viewpoints had to indicate that their messages were not those of the utility, and if the utility had the opportunity to respond to the messages. See 54 U.S.L.W. 4151, 4154. Government may not force

upon someone the appearance of believing something he does not in fact believe:

The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society—as in the case of compulsion to give evidence in court.

*Barnette*, 319 U.S. at 645 (Murphy, J., concurring).

Rotary International cannot object if the men that comprise a Rotary club decide to admit a woman to their membership, so long as they do not continue to be a Rotary club or use Rotary symbols. In that case, there is no danger that someone will think other Rotary members favor altering the Rotary membership requirements. The Rotary Club of Duarte, however, wants both to admit women and to continue as a Rotary club. Rotary International responds on behalf of the many Rotary members who object to admitting women and to being associated with the position that women should be members of Rotary clubs. Rotary International does not ask the club in Duarte to disband. It only asks it not to call itself a Rotary club. The Court of Appeal decided in favor of the Duarte club, thereby violating the First Amendment rights of other Rotary members.

California may encroach on Rotary members' free speech rights if it demonstrates a compelling countervailing state interest and if that interest cannot be achieved by means less restrictive of First Amend-

ment rights. *E.g.*, *Wooley*, 430 U.S. at 715-16; *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). California has a legitimate interest in ensuring that all of its citizens have equal access to business establishments. The legitimacy of its interest ends, however, when it tries to give all of its citizens equal access to private clubs.<sup>5</sup> The benefit to the public from such an encroachment is minimal, and it pales in comparison to the restriction on First Amendment rights that such an encroachment effects.

The Court of Appeal's decision not only forces Rotary members to be associated with a viewpoint to which they object; it also forces these members to choose between their freedom of intimate association and their freedom of speech. These members must either leave their local club, of which they may have been a members for years, or they must risk being associated with a position to which they object. A state's interest in eliminating discrimination cannot be so strong as to force people to make such a choice. If the government may not require a person to give up a constitutionally protected right to receive a benefit, *FCC v. League of Women Voters*, 468 U.S. 364; *Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1982); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Speiser v. Randall*, 357 U.S. 513 (1958), it may not

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<sup>5</sup> The Court of Appeals for the Third Circuit recently held that a New Jersey law prohibiting discrimination in places of "public accommodation" does not extend to Kiwanis Clubs because the Kiwanis do not invite "an unrestricted and unselected public to join as members." *Kiwanis Int'l v. Ridgewood Kiwanis Club*, Nos. 85-4306 and 85-4483, slip op. at 15 (3d Cir. 3 Dec. 1986) (Garth, J.), *rev'g* 627 F. Supp. 1381 (D.N.J. 1986).

require a person to give up one constitutional right to exercise another.

Because the decision of the Court of Appeal in the instant cases forces Rotary members to be associated with a viewpoint to which they object, and because it forces them to choose between their freedom of intimate association and their freedom of speech, this Court should reverse that decision.

### CONCLUSION

According to the factors this Court announced in *Roberts*, Rotary clubs have a constitutionally protected freedom of intimate association because they are small in size, selective in membership, closed to the public in large part, and seek to foster fellowship among their members. In the name of providing women equal access to business establishments, the Court of Appeal of the State of California violated this constitutional right. It also violated the First Amendment right of Rotary members not to be associated with a viewpoint to which they object, and it forced these members to choose between their constitutionally protected rights of free speech and free association. It is appropriate for California to ensure that all of its citizens have equal access to business establishments, and the members of the Rotary Club of Duarte and of the Court of Appeal no doubt mean well when they seek to extend that principal to private clubs. What they fail to realize, however, is that one of the purposes of our Constitution is to protect people with unpopular views from coercion by the majority, even if the majority means well. As Justice Brandeis said of the drafters of our Constitution, "They conferred, as against the government, the right



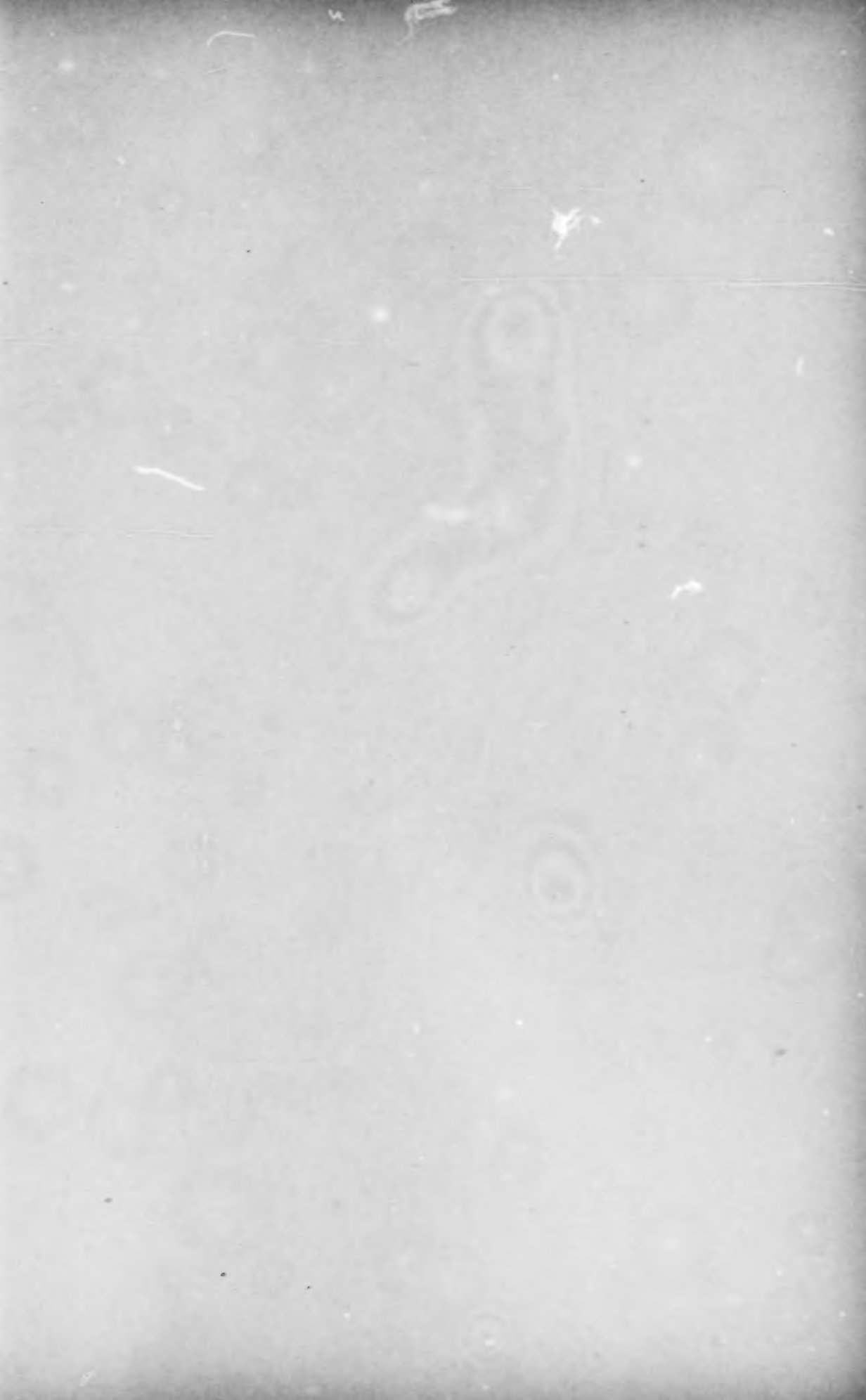
to be let alone—the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting). Rotary clubs ask only that the State of California leave them alone. With Justice Brandeis’ words in mind, this Court should reverse the decision of the Court of Appeal of the State of California.

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JOSEPH F. SPANIOL, JR.  
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In The  
Supreme Court of the United States

October Term, 1986

BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

*Appellants.*

v.

ROTARY CLUB OF DUARTE, et al.,

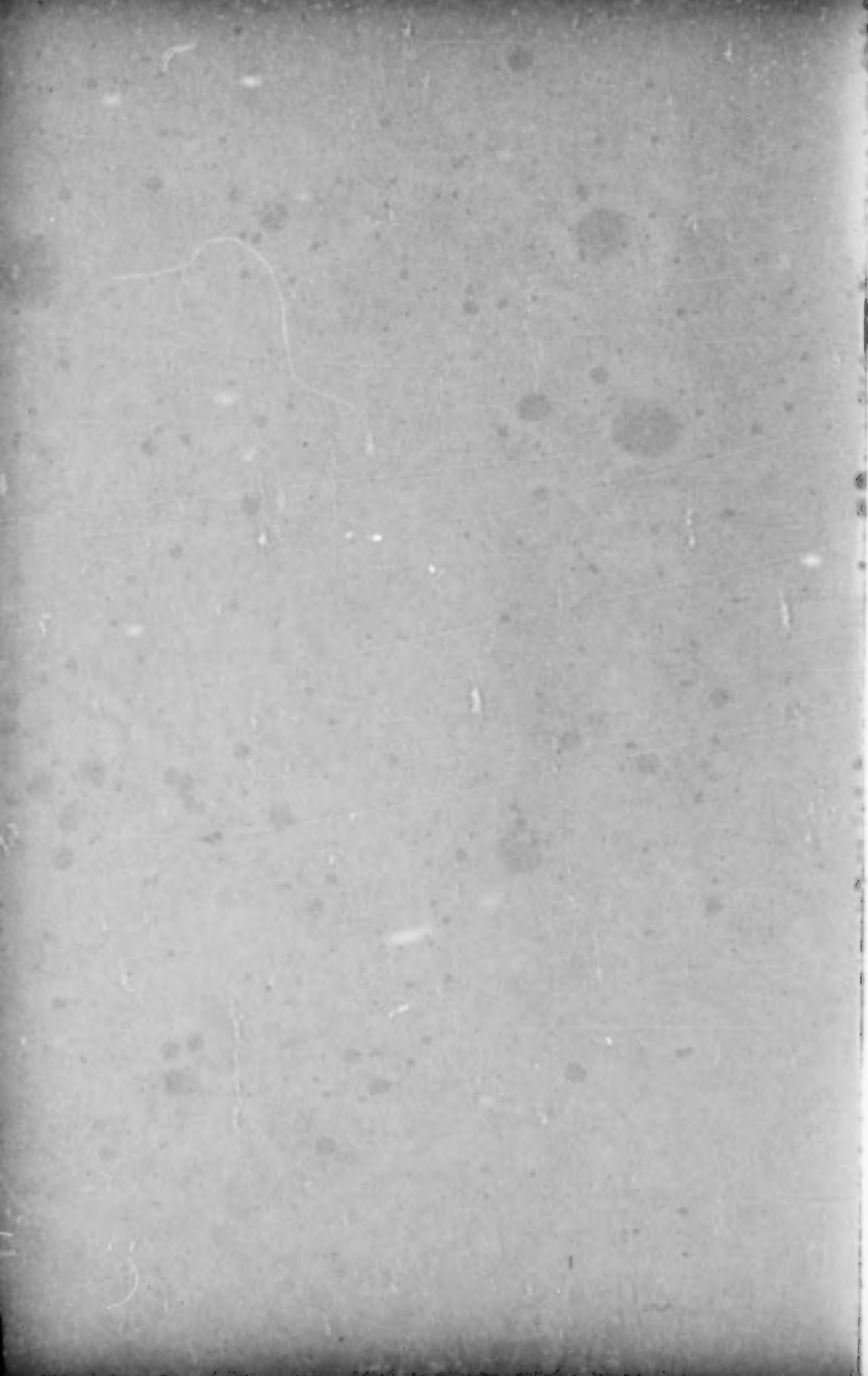
*Appellees.*

Appeal from the Court of Appeal  
of the State of California,  
Second Appellate District

BRIEF OF PILOT CLUB INTERNATIONAL,  
SOROPTIMIST INTERNATIONAL OF THE  
AMERICAS, INC., AND ZONTA INTERNATIONAL  
AS AMICI CURIAE IN SUPPORT  
OF APPELLANTS

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In The  
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BOARD OF DIRECTORS OF ROTARY  
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v.

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Appeal from the Court of Appeal  
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**BRIEF OF PILOT CLUB INTERNATIONAL,  
SOROPTIMIST INTERNATIONAL OF THE  
AMERICAS, INC., AND ZONTA INTERNATIONAL  
AS AMICI CURIAE IN SUPPORT  
OF APPELLANTS**

---

Pilot Club International, Soroptimist International of the Americas, Inc., and Zonta International submit this brief as amici curiae in support of the appellants, Board of Directors of Rotary International and Rotary District 530.

## INTEREST OF AMICI

Each of the amici are female service clubs which are both national and international in scope and membership. Although each of the amici have restricted their membership to women, the history, purpose and programs of each organization differ. The following is a brief description of the nature and work of each organization.

Pilot Club International (Pilot) is a civic service organization for executive and professional women organized in 1921 in Macon, Georgia. It presently has approximately 21,000 members in more than 600 local clubs in eight countries. Pilot is non-profit, non-partisan and non-sectarian. The objectives of Pilot are to develop friendship as a means of broadening opportunity for service, to encourage international peace and cultural relations, to inculcate the ideal of service, encourage high ethical standards among executive and professional women, and to promote active participation in movements which will improve the welfare of the community.

The programs of the Pilot Club are varied, but emphasize work with disabled individuals. Pilot sponsors local organizations for high school and college students, open to both sexes; sponsors scholarships for international students and for adults seeking a second career; and works with an international foundation to carry out programs of education emphasizing principles of freedom.

Pilot's membership is by invitation only and is limited to women. Members are classified according to their profession and only a limited number is allowed in each classification in order to maintain a diversity in business and professional interests. Each club is autonomous in selecting its programs and charitable service projects to meet the needs of its own community.

Soroptimist International of the Americas, Inc. (Soroptimist) is one of four federations of an international organization, known as Soroptimist International, founded



in 1921 in Oakland, California. Soroptimist is composed of nearly 1,300 local clubs with nearly 47,000 members in 23 countries. The purpose and intent of the Soroptimist clubs are to develop interest in community, national and international affairs and assist in developing patriotism and love of country. There are six program areas presently defined by the International: (1) economic and social development; (2) education; (3) environment; (4) human rights and the status of women; (5) health; and (6) international goodwill and understanding. Each local club can choose the projects in which to participate and may organize its own local charitable work.

Soroptimist has been involved in economic development projects in the third world, such as developing water supply systems, sanitation, education and health programs in Mexico and work training centers in Calcutta and the Philippines, and working with the earthquake victims of Mexico. Local clubs have been involved in projects as varied as working to develop shelters for abused women and children, working with illiterates and handicapped individuals, and working on local environmental, nutrition and health programs. The organization sponsors scholarships for women in universities and for older women who must enter the job market to provide support for themselves and their families. Awards to distinguished women and for youth citizenship are also given. The organization's youth citizenship award and its sigma clubs are accessible to both sexes.

Although the by-laws of the Soroptimist are silent concerning the admission of men, the organization is composed entirely of women. Membership is also by invitation only, and a classification system similar to that of the Pilot organization is used.

Zonta International (Zonta) is an international women's service organization of over 35,000 executive women in business and professions in over 1,000 local clubs

in 48 countries. Unlike the Pilot and Soroptimist organizations, the essential programmatic function of Zonta is the advancement and support of women. It was founded in Buffalo, New York in 1919.

Zonta is engaged in a number of economic development programs in underdeveloped countries whose primary aim is women, such as creating work programs for women in Argentina, Botswana, Comoros Islands, Mexico, Thailand and Zimbabwe; development of a project to provide drinking water in Sri Lanka; health and education centers in Colombia; and mobile medical units in rural Ghana. Zonta provides scholarships to women in university aerospace, related science and engineering studies under the Amelia Earhart Fellowship Awards Program; Ms. Earhart was a Zontian. It sponsors youth service clubs and supports projects for senior citizens.

Zonta as well restricts its membership to women; membership is by invitation only and is limited to various professional and career classifications determined by the local clubs within the framework of international guidelines.

In addition to these three organizations, there are two other women's service organizations. Their membership, policies and organizations are similar to the amici.

Quota International, Inc., founded in 1919, with nearly 13,000 members in 450 clubs throughout the United States and eight other countries, is a group for executive, business and professional women. Although each local club chooses its own community and international service projects, emphasis is on service to people with hearing and speaking disabilities.

Altrusa International, Inc., with 21,000 members, 583 clubs in 17 countries, was founded in 1917. Its emphasis at the international level is on education aimed at improving the welfare of women. Altrusa sponsors scholarships and award programs for women in developing countries. Local

clubs have a great deal of autonomy to choose programs and areas of involvement.

The appellants seek review in this Court to reverse the judgment of the California Court of Appeal that requires them to admit women. That Court held that *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), mandates an application of the California Unruh Act to require appellants to admit women. Appellants argue, however, that the criteria enunciated by this Court in *Roberts*, if applied in this case, support a holding that their rights under the First Amendment would be violated by an order requiring the admission of women.

For this proposition, the appellants assert that the organization, nature and character of the Rotary clubs differ markedly from the Jaycees clubs in *Roberts*. These distinctions require a different application of the criteria discussed in *Roberts*.

From a review of the record in this case, it appears that the structure and nature of the Rotary clubs are quite similar to those of the amici. Their membership and selection procedures are similar; their organization is the same; the size of the local clubs is approximately the same; each of the organizations is a true service club in that its programs do not seek to benefit the members but to provide service to the public; and memberships are not solicited.

Should the Court rule that the First Amendment rights of the appellants do not allow them to have a male club only, it would appear that the amici organizations, comprised of women, would be equally required to admit men who wished to join. The clubs' discretionary selection policies would be undermined. The consequences of this change would be profound to both the amici and also to the private service club movement in the United States. The character, intent and identity of these organizations would be destroyed and its programs diluted and compromised.

For these reasons, amici have an interest in the out-

come of this case and urge the Court to reverse the California Court of Appeal and allow the appellants to restrict their membership to men.

## ARGUMENT

### I. THE FIRST AMENDMENT FREEDOM OF MEMBERS OF AMICI TO ENTER INTO AND MAINTAIN CLOSE RELATIONSHIPS WOULD BE ABRIDGED BY A RULING UPHOLDING THE CALIFORNIA COURT OF APPEAL

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court recognized the First Amendment's freedom to enter into and maintain certain intimate and personal relationships and tested the Jaycees organization under these principles. Because the Court found that organization to be large, impersonal, unselective and designed for the direct economic advancement of its members, it held that such freedom was not compromised by requiring the admission of women into the Jaycees.

The Court explained in *Roberts* that such characteristics as "size, purpose, policies, selectivity, congeniality", *id.* at 620, could require constitutional protection not found with the Jaycees. Appellants in this case analyze their organizations under these criteria and urge the Court to find them distinguishable from the Jaycees. As explained above, the amici organizations are organized and operated in a manner similar to the appellant Rotary clubs. The local clubs are relatively small, quite selective, seek to work among themselves as members separate from others, and base their activities on the ideal of public service.

Should this Court rule on the facts presented in this record that the appellants are not protected by the First Amendment's right to enter into and maintain close relationships, two crucial values long held by the amici will be compromised, if not destroyed.

### A. Diversity

The Court in *Roberts* recognized that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State." *Id.* at 618-19. If the right of the appellants to limit membership to men were removed and members could not maintain the diversity of their constituency, the special nature of all service organizations, male or female, will be gone.

Each of the three women's service organizations is unique and, although women only are admitted, each is quite different from the other in its programs, character and history. Zonta, for example, tailors its programs solely to women's advancement throughout the world, and the direct goal of its programs is the improvement of the condition of women. Soroptimist, on the other hand, has as only one of its international organization's goals the advancement of women. Pilot, however, does not have this as one of its specific goals, although local clubs are allowed to involve themselves in such projects. Each organization has its own special history and method of operations. Although each organization has established foundations, awards and scholarship programs, the recipients and goals of those programs differ.

These make each organization distinctive and special. It is important in our country to have all male clubs, all female clubs and mixed clubs with different purposes, programs and methods of operation. These differences promote an important diversification which does "act as [a] critical buffer[] between the individual and the power of the State." *Roberts* at 619.

The amici urge the Court to give important emphasis to the importance of diversification in our constitutional system reflected in their clubs and the Rotary clubs.



### B. Self-Identity.

The Court also recognized in *Roberts* that "individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference, therefore, safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.*

One of the important purposes of these women's service organizations is to give professional women the opportunity to work and share with other professional women. This could not occur in clubs of both sexes. By organizing and working together as women, members are given the opportunity to develop relationships of support, advice and shared goals with other women which foster individual growth and development.

Should women's service clubs be required to admit men, these unique and special benefits to women will be eviscerated.

## II. THE FIRST AMENDMENT GUARANTEE OF ASSOCIATIONAL FREEDOM WOULD BE ABRIDGED BY A RULING UPHOLDING THE CALIFORNIA COURT OF APPEAL.

The Court in *Roberts* recognized a second independent basis for protecting private associations from undue interference and regulation by the State. The First Amendment protects an individual's right to join with others and engage in group efforts "in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." *Id.* at 622. The Court said, with respect to private clubs (*Id.* at 623):

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore

plainly presupposes a freedom not to associate.

In *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981), the Court explained that:

The practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process....The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities...[and][i]ts value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

If men were forced upon these groups as members, amici believe that their purposes and goals would be diluted, compromised and in some instances destroyed. The focus of their group effort would most likely be shifted to more generalized goals more compatible with the preferences and ideas of its male members and less focused on women. Women are entitled to organize themselves exclusively in a group to work toward shared goals. Their exclusivity gives them strength and a cohesion of purpose.

Under our constitutional system, these rights are cherished and cannot be abridged or compromised. A reading of *Roberts* which would require the appellants to admit women will work a severe injury on the amici organizations and on the entire service club movement in this nation.



**CONCLUSION**

The Court should reverse the judgment of the California Court of Appeal.

Respectfully submitted,

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(14)  
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**In The Supreme Court**  
OF THE  
**United States**

OCTOBER TERM, 1986

**BOARD OF DIRECTORS OF ROTARY  
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Appellants,**  
v.  
**ROTARY CLUB OF DUARTE; et al.,  
Appellees.**

On Appeal From the Court of Appeal  
of the State of California,  
Second Appellate District

**BRIEF OF THE BOY SCOUTS OF AMERICA  
AS AMICUS CURIAE  
IN SUPPORT OF APPELLANTS ROTARY  
INTERNATIONAL, ET AL.**

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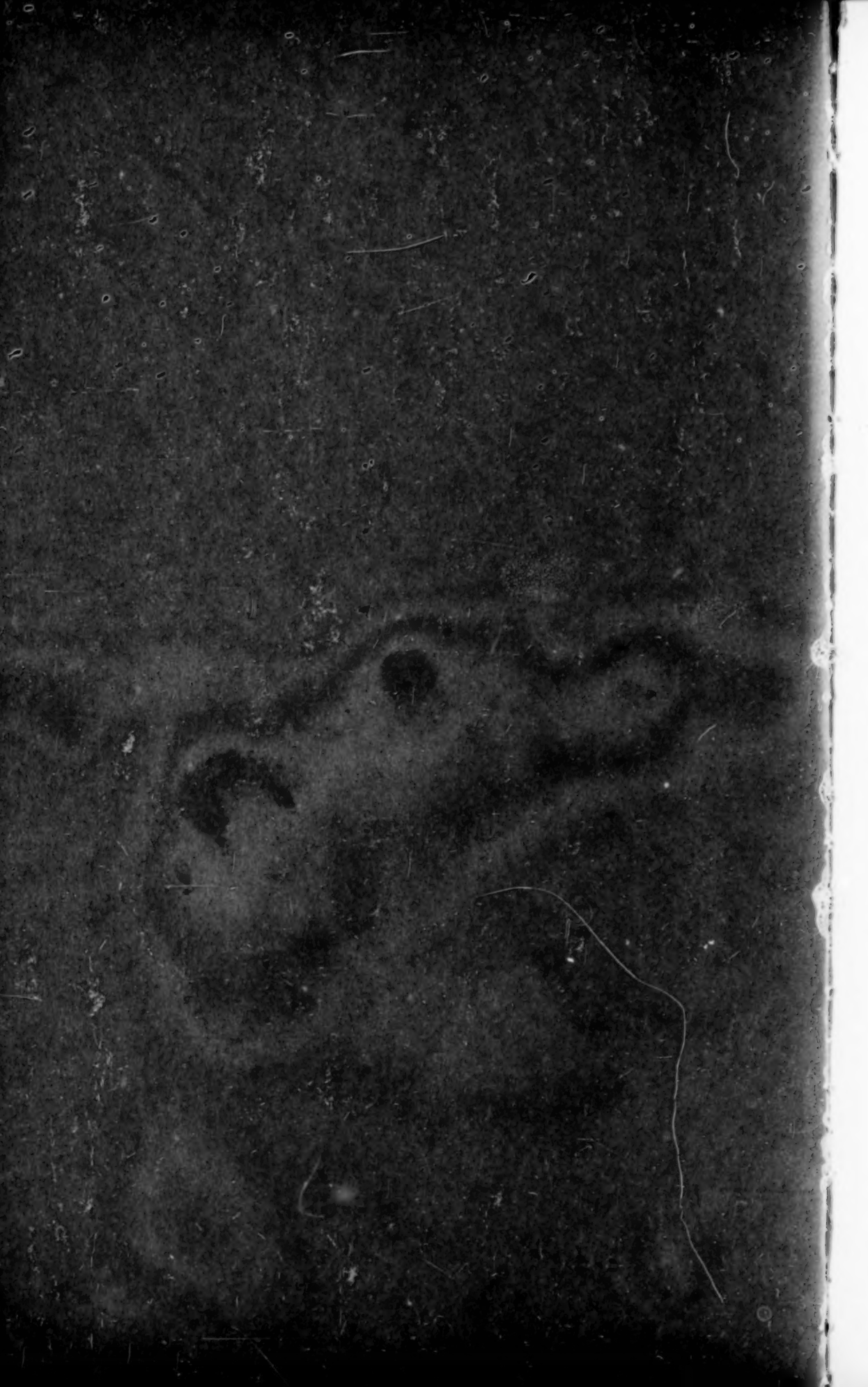
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No. 86-421

# In The Supreme Court

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OCTOBER TERM, 1986

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**BRIEF OF THE BOY SCOUTS OF AMERICA  
AS AMICUS CURIAE  
IN SUPPORT OF APPELLANTS ROTARY  
INTERNATIONAL, ET AL.**

---

The Boy Scouts of America, as *amicus curiae*, supports reversal of the judgment of the Court of Appeal of the State of California, Second Appellate District. 178 Cal. App. 3d 1035 (1986).

## **INTEREST OF THE AMICUS CURIAE**

The Boy Scouts of America is a voluntary, nonprofit membership organization chartered by Congress in 1916

“to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues.” 36 U.S.C. § 23.

Boy Scouts accomplishes this mission through thousands of individual Scout troops, Cub packs and Explorer posts at the neighborhood level. Of principal significance to this brief is the Scout troop, a small, intimate group of approximately 15 to 30 boys, which is Scouting's means of teaching and training boys primarily aged 11 through 14. Each troop is led by an adult male member, a Scoutmaster. Because Boy Scouts believes that the inculcation of its values in 11 to 14 year old boys is better accomplished by a male whom the boys may imitate, the Scoutmaster must believe in the values and principles of Scouting. In addition, the Scoutmaster must be, and must be perceived as, the type of individual to whom parents may entrust their sons for weekly meetings, overnight hiking and camping trips and summer camp.

This case presents issues of vital interest to the Boy Scouts because the California Court of Appeal's zealous enforcement of state laws without sufficient sensitivity to the Constitutional rights of association, which may well be followed by other courts, threatens Boy Scouts' ability to select Scoutmasters necessary to accomplish the purposes of Scouting. Indeed, Boy Scouts' determination that its associational mission needs male Scoutmasters who believe in the values of Scouting presently is under attack in a number of state courts. A case now pending in California challenges Boy Scouts' right to select only leaders who share its moral beliefs.<sup>1</sup> The case seeks to

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<sup>1</sup>*Curran v. Mt. Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *hearing denied*, (Cal. January 6, 1984), *appeal dismissed*, 468 U.S. 1205 (1984). The Court of Appeal held that, assuming plaintiff could prove the allegations of his complaint, Boy Scouts (and the local council involved there) were "business establishments" that could not lawfully exclude homosexuals from the position of Scoutmaster. The parties in *Curran* have postponed trial in order to obtain the benefit of the Court's guidance in this case.

force Boy Scouts to accept as a Scoutmaster an individual who is a practicing homosexual and a public advocate of the morality of homosexual conduct. Boy Scouts holds as one of its fundamental values that homosexual conduct is not moral.<sup>2</sup>

Cases now pending in other states seek to force Boy Scouts to accept women as Scoutmasters and thereby deny Boy Scouts their basic tenet that a male role model is the appropriate teacher and transmitter of Scouting values in boys who are just coming of age.<sup>3</sup>

This case provides the Court with an opportunity to establish standards that will shield Boy Scouts and similar organizations from unwarranted governmental interference into the exercise of their protected associational rights. While Boy Scouts' interests in selecting Scoutmasters is qualitatively different than the interests of Rotary members in associating only with men, both raise rights deserving of Constitutional protection. In protecting First Amendment freedoms and "in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar."

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<sup>2</sup>This Court recently recognized that "Condemnation of [homosexual] practices is firmly rooted in Judeo-Christian moral and ethical standards." *Bowers v. Hardwick*, \_\_\_\_ U.S. \_\_\_\_, 106 S. Ct. 2841 (1986) (Burger, C.J., concurring).

<sup>3</sup>*Pollard v. Quinnipiac Council, Boy Scouts of America*, PA-SEX-37-3 (Conn. Comm. on Human Rights and Opportunities) (decision of hearing examiner, January 4, 1984), *vacated*, (Conn. Super. Ct. May 19, 1986), *on appeal*, (Conn. Supreme Ct.); *Adamski v. Suffolk County Council of the Boy Scouts of America*, P-S-73766-80 (N.Y. Div. of Human Rights). Women serve in positions throughout the Boy Scouts' organization, including at the highest levels. The exception is the troop Scoutmaster where Boy Scouts believes that a male role model provides the most effective way to help boys mature into men.

*NAACP v. Button*, 371 U.S. 415, 432 (1963). This Court also has recognized that "First Amendment freedoms need breathing space to survive." *Id.* at 433. Accordingly, Boy Scouts urges this Court to consider the impact upon Scouting of the extremely broad interpretation given the California public accommodation statute. Boy Scouts further urges the Court to vindicate the Constitutional rights of Rotary and, in so doing, to send a message to the courts and potential litigants that truly private associations, like the Rotary and the Boy Scouts, have the right to determine membership policies free from state intrusion. This brief analyzes the nature of these Constitutional rights and demonstrates their applicability both to the appellant and to this *amicus curiae*.

## SUMMARY OF ARGUMENT

### I

The Constitution protects from state interference the individual's right to enter into and maintain certain close relationships. The relationships protected by the right of intimate association are those that are small, selective and secluded at the level at which the relationship is formed and nurtured. Among the most highly protected intimate associations are those between children and the adults to whom their education and development are entrusted.

Individuals form protected intimate associations in both local Rotary clubs and Boy Scout troops. Each is small in size, select in membership, and secluded in its principal activities.

### II

The Constitution also protects from state interference individuals' rights to group together to enhance and

strengthen their shared beliefs in pursuit of common goals. There can be no greater interference with the exercise of the right of expressive association than the forced admission into the group of individuals who espouse contrary beliefs or goals from those shared by the membership. The state can so interfere with the right of expressive association only by showing that its interest is compelling.

The state has a significant interest in ending certain invidious discriminations that deny individuals the ability to advance themselves economically. However, the state has little or no interest in regulating private, purely social relationships. Accordingly, the state's interest in regulating the membership policies of a private group that does not confer economic or business advantage on its members falls far short of compelling.

This fundamental proposition controls the instant case and those cases involving the expressive associational rights of Boy Scouts. Boy Scouts' purpose is not to confer economic or business advantage on its members, but rather to develop the character and fitness of boys. The Scoutmaster's only reward is the satisfaction derived through service to others. Similarly, Rotary is not economically motivated and in fact expressly discourages its use for economic or business gain. The state has no compelling interest in regulating either organization's membership.

### III

The California public accommodations statute, as interpreted by the California courts, impermissibly chills First Amendment associational rights. Groups such as the Boy Scouts must guess as to whether the statute applies to them and, if so, what "discrimination" it prohibits. This Court should strike down the California statute as vague



and overbroad or set out in the clearest terms possible the protection to be afforded to such associational rights.

## ARGUMENT

### I

#### THE COURT SHOULD PROTECT INTIMATE ASSOCIATIONS FROM STATE INTERFERENCE

This Court only recently reaffirmed the independent Constitutional status of the right of intimate association. In *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984), the Court held that the Constitution protects the individual's "choices to enter into and maintain certain intimate human relationships" against intrusion by the State. These close relationships and the resulting personal bonds deserve Constitutional protection because they cultivate and permit the transmission of shared ideals and beliefs. Such relationships create the close ties from which individuals draw much of their emotional enrichment. *Id.* at 618-19. As the Court stated:

"Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619.

This Court's *Roberts* opinion articulated standards to govern the determination of which intimate associations deserve Constitutional protection. The relevant inquiry focuses on the characteristics of the association at the level at which the individual members interact. Specifically, the Court found that the human relationships fostered by association at that level generally "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620. By being small,



select and secluded at the level of interaction, the association facilitates the cultivation of shared values and emotional bonds which are the essence of the Constitutional freedom.

At one end of a spectrum of associations are organizations, such as the Jaycees, entitled to little or no constitutional protection because the activity central to the formation and maintenance of the association involves large and basically unselective groups in which strangers to the relationship may participate. *Id.* at 620-21. At the other end are the intimate relationships among family members and most especially parents and their children that are entitled to the greatest protection. *Id.* at 619-20. "The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights.'" *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted). Accordingly, "[t]his Court has long recognized that freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974).

The Constitutional liberty of parents to direct the upbringing and education of their children protects from unwarranted state interference the relationships between children and those to whom parents entrust their education and guidance. The Court has long recognized that the teacher's right to teach and the parent's right to engage teachers for their children are among the basic Constitutional liberties guaranteed by the Fourteenth Amendment. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-40 (1923). These rights rest upon the principle that:

"The fundamental theory of liberty upon which all governments in this Union repose excludes any gen-

eral power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535.

"The duty to prepare the child for 'additional obligations,' referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."

*Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

The education of children is not limited to the classroom. Groups such as the Boy Scouts and Girl Scouts prepare youth for such "additional obligations" outside of the formal educational process. Boy Scouts' methodology for so educating 11 to 14 year old boys is through the intimate association of small groups of boys in a troop led by its Scoutmaster. Boy Scouts believes that providing a close personal relationship outside of the home with an adult male who endorses Boy Scouts' values helps boys in the difficult process of maturing into men. The boys thereby develop character, learn moral standards and citizenship and draw emotional support.

The Boy Scout troop satisfies all of the *Roberts* standards for protected intimate association. It is small, ranging in size from 15 to 30 boys. While all boys and adult Scoutmasters also are members of the nationwide Boy Scouts' organization, that fact does not deprive the troop of its Constitutional protection because it is the emotional bonds and camaraderie formed within a local troop that provides the intimate association around which the Scouting program revolves. Boys in a troop usually meet weekly and together go on overnight camping trips

several weekends a year, developing regular, continuous, social and personal relationships.

The Boy Scout troop is selective in its choice of a leader to fill the position of Scoutmaster. Consistent with the Boy Scouts' goal of providing boys aged 11 through 14 with a male role model from whom they can learn by imitation, the Scoutmaster must be a man who endorses the Boy Scouts' goals and values. Boy Scouts closely examines an applicant's qualifications and morals, as well as his belief in the fundamental principles of Boy Scouts.

Finally, the Boy Scout troop is seclusive in the critical aspects of its relationship to the boys. The principal activities of the troop are limited to Scouts themselves, and those who are not members do not ordinarily participate. Therefore, the small, select and secluded human relationships between boys and men fostered in a Boy Scout troop are protected by the Constitutional right of intimate association.

The standards set forth in the *Roberts* opinion similarly support the Rotary's right of intimate association, which the State of California seeks to destroy by requiring the Rotary to admit women as members. While lacking the highest protection afforded child-rearing and educational association, the Rotary organization fosters human relationships which at the local level are small, selective and secluded. Local Rotary clubs average no more than 46 members and are highly selective in admitting members. Membership in a local Rotary club is restricted to males, by invitation only, and is not solicited from nor available to the public generally. Members meet in weekly meetings closed to the public and participate in Rotary activities limited to members. The Rotary organization fosters bonds of personal friendship and the values of charitable service in an intimate club setting. Accordingly, the Constitutional right of intimate association protects Rotary

from state intrusion compelling it to admit women. The Court should so hold by reaffirming its *Roberts* opinion in language sufficiently clear to protect similar organizations from state interference.

## II

### **THE COURT SHOULD PROTECT EXPRESSIVE ASSOCIATIONS FROM STATE LAWS THAT WOULD FORCE THE ADMISSION INTO MEMBERSHIP OF INDIVIDUALS WHOSE EXCLUSION DOES NOT RESULT IN ANY COMMERCIAL OR ECONOMIC DEPRIVATION**

#### **A. The Constitutional Protection Of The Freedom Of Expressive Association.**

The Court has long recognized as a basic Constitutional right the freedom of an individual to associate for the purpose of advancing shared beliefs and ideas. *Democratic Party v. Wisconsin*, 450 U.S. 107, 121 (1981); *Abood v. Detroit Board of Education*, 431 U.S. 209, 233 (1977); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam); *Healy v. James*, 408 U.S. 169, 181 (1972); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The Court in *Roberts* reaffirmed the right of the people to form groups to pursue social, cultural, religious, and educational ends:

“An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed . . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in the pursuit of a wide variety of political, social, eco-

conomic, educational, religious, and cultural ends.”  
486 U.S. at 622.

The individual members of a group use their association to facilitate and strengthen the expression of their own views. Insistence on undiluted adherence to the groups goals, values or characteristics gives a group its cohesiveness and makes possible its collective effort in pursuit of shared goals. “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . .” *NAACP v. Alabama*, 357 U.S. at 460. Whether the shared goal is best achieved through association with people of the same political belief, with people of the same sex or marital status, or with people of the same moral values, the group’s binding together for the common goal fosters the presentation of various points of view and ideas and preserves the diversity that is so essential to a free society. See *Roberts v. United States Jaycees*, 468 U.S. at 622; *NAACP v. Alabama*, 357 U.S. at 462-63.

Boy Scouts engages in the very type of expressive association long protected by this Court. Justice O’Connor recognized explicitly in her concurring opinion in *Roberts* that Boy Scouts engages in protected expressive association. Citing Girl Scouts and Boy Scouts publications, Justice O’Connor wrote that

“Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.” 468 U.S. at 636.

Justice O’Connor correctly appreciated Boy Scouts’ devotion to advancing its own particular set of values and furthering its central purposes of developing moral character, educating boys in the responsibilities of citizenship,



and developing personal fitness, including physical, mental, moral and emotional fitness. Boy Scouts pursues these aims through a program emphasizing outdoor camping and hiking, peer group leadership, and community service.

The Boy Scout values embodied in the Scout Oath and Scout Law <sup>4</sup> are an integral part of the Scouting program.

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<sup>4</sup>The words of the Scout Oath are

"On my honor I will do my best  
To do my duty to God and my country  
And to obey the Scout Law;  
To help other people at all times;  
To keep myself physically strong,  
Mentally awake, and morally straight."

The Scout Law provides that a Scout is

"TRUSTWORTHY.	A Scout tells the truth. He keeps his promises. Honesty is a part of his code of conduct. People can depend on him.
LOYAL.	A Scout is true to his family, Scout leaders, friends, school, and nation.
HELPFUL.	A Scout is concerned about other people. He does things willingly for others without pay or reward.
FRIENDLY.	A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs other than his own.
COURTEOUS.	A Scout is polite to everyone regardless of age or position. He knows good manners make it easier for people to get along together.
KIND.	A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not hurt or kill harmless things without reason.
OBEDIENT.	A Scout follows the rules of his family, school, and troop. He obeys the laws of

Even before a boy may become a member, he must satisfy his Scoutmaster that he intends to live by the Scout Oath and Scout Law. Thereafter, each Scouting activity has as its purpose the inculcation in its members of these and other values. For example, through outdoor camping and hiking activities Scouts learn to share responsibilities, live with others, learn outdoor survival skills, and develop an appreciation for nature. Scouting provides a series of challenges for the Scout for which he is rewarded by a merit badge or progress award after the achievement of each challenge. Earning each award increases the Scout's self-confidence and self-reliance and furthers the Scout along the path of self-improvement. At weekly meetings

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his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.

**CHEERFUL.**

A Scout looks for the bright side of things. He cheerfully does tasks that come his way. He tries to make others happy.

**THRIFTY.**

A Scout works to pay his way and to help others. He saves for unforeseen needs. He protects and conserves natural resources. He carefully uses time and property.

**BRAVE.**

A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at or threaten him.

**CLEAN.**

A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean.

**REVERENT.**

A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others."



or evening campfires the Scoutmaster often makes a moral message a part of the program.

Rotary engages in the same types of protected expressive association. It is organized to "provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." Rotary achieves these objectives through a program designed to encourage congeniality and fellowship among business and professional men. The Rotary ideal is "Service Above Self." As a group, the Rotarians participate in many community service and civic-oriented activities. These activities are voluntary and uncompensated. Weekly Rotary meetings and participation in service projects promote the camaraderie that each individual member and the group as a whole strive to achieve.

**B. There Is No Clearer Interference With The Right Of Expressive Association Than The Forced Admission Of Individuals With Contrary Views.**

Before *Roberts*, the Court recognized that the right to define a group's identity and purposes through membership criteria is an essential ingredient of the freedom of association. The First Amendment right "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981).<sup>5</sup> The right "would prove an empty guarantee if associations could not limit control over their decisions

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<sup>5</sup>" "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974), quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting).

to those who share the interests and persuasions that underlie the association's being.' " *Id.* at 122 n.22. *Roberts* confirmed that:

"[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate." 468 U.S. at 623.

The lower courts, however, have not heeded this Court's interdiction. In cases like this one and those involving Boy Scouts, the courts have announced an intention to force associations to accept members whom they not only do not desire but whose admission would be fundamentally inconsistent with the continuation of the association. For example, control of Boy Scouts' membership policies, and especially its policies as to the selection of Scoutmasters, is critical to the Boy Scouts' inculcation of values and beliefs. By carefully selecting its adult role models, the Boy Scouts ensure the transmission to the boys of these values and beliefs. Yet, in contradiction of its values, the *Curran* case in California seeks to require the Boy Scouts to make an advocate of the morality of homosexual conduct a Scoutmaster or Assistant Scoutmaster.

Similarly, in this case, the California Court of Appeal seeks to force Rotary to admit women in direct conflict with Rotary's belief that its male-only policy is essential to its prized camaraderie and fellowship. This state intrusion would be widely felt within the organization for the reasons reviewed more fully in Rotary's brief.

**C. The State Lacks A Compelling Interest In Forcing The Admission Into An Association Of Individuals Whose Exclusion Does Not Deprive Them Of Commercial Or Economic Advantage.**

The state's interest in overriding the rights of an association to determine its membership must be compelling:

"Infringements on [the right to associate] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."

*Roberts*, 468 U.S. at 623; *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *NAACP v. Alabama*, 357 U.S. 449, 463 (1958). The state therefore cannot automatically justify its action by amor- phously stating that it seeks to end all discrimination. It is discrimination — in the non-insidious sense of selec- tion or differentiation — that is at the heart of associa- tional freedom. *Roberts* does not hold to the contrary. Rather, the Court in *Roberts* simply determined that the Jaycees failed to demonstrate either a sufficiently serious intrusion into its associational rights or the inadequacy of the allegedly compelling state interest.

The *Roberts* Court first analyzed the burden imposed by the state public accommodations law on the membership policies of the Jaycees. 468 U.S. at 626. Although the Court recognized that a substantial part of the Jaycees' activities were protected expression, it was unable to conclude that forced admission of women, who already participated in much of the group's training and commu- nity activities, would burden the protected expression of the organization:

"There is, however, no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views. The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." 468 U.S. at 627.

After determining that there were no serious burdens on the male members' freedom of association, the Court turned its attention to the state's interest in regulating the Jaycees' membership. Because it found that the Jaycees was essentially commercial in nature, the Court found that the state's interest was compelling:

"[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent." 468 U.S. at 628.

The state law intrusions into the membership policies of Boy Scouts and Rotary both more directly impair the organizations' ability to engage in their protected activities and serve far less important state interests. As previously demonstrated, forced admission of individuals with views contradictory to those of each organization places a serious burden on each organization's freedom of expressive association. A requirement that the Boy Scouts admit individuals who are diametrically opposed to Scouting values places a serious burden on the freedom of expressive association of its members. Since Boy Scouts believes homosexual conduct is immoral, forced admission of individuals who believe homosexual conduct is moral destroys Boy Scouts' "ability to exclude individuals with ideologies or philosophies different from those

of its existing members," 468 U.S. at 627, and interferes severely with Boy Scouts' ability to "engage in [its] protected activities or to disseminate its preferred views." *Id.* The freedom of association of Rotary members is similarly impaired, as reviewed more fully above and in Rotary's brief.

On the other side of the balance, the state's interest in regulating the membership policies of Boy Scouts or Rotary is not compelling. Neither Boy Scouts nor Rotary is economically or commercially oriented. The position of Scoutmaster is a volunteer position. The only reward that the Scoutmaster receives is spiritual enrichment through service to others and the satisfaction of watching boy members develop. Rotary is a service and fellowship organization, which expressly discourages use of Rotary for economic or business gain. Members receive no economic gain from their service and community projects.

Justice O'Connor, concurring in *Roberts*, refused even to examine the seriousness of the state's intrusion into associational rights, but instead would determine whether the state's interest is compelling solely by examining the nature of the association. The state interest would be compelling only where the association is primarily commercial:

"Many associations cannot readily be described as purely expressive or purely commercial. No association is likely ever to be exclusively engaged in expressive activities, if only because it will collect dues from its members or purchase printing materials or rent lecture halls or serve coffee and cakes at its meetings. And innumerable commercial associations also engage in some incidental protected speech or advocacy. The standard for deciding just how much of an association's involvement in commercial activity is enough to suspend the association's First



Amendment right to control its membership cannot, therefore, be articulated with simple precision. Clearly the standard must accept the reality that even the most expressive of associations is likely to touch, in some way or other, matters of commerce. The standard must nevertheless give substance to the ideal of complete protection for purely expressive association, even while it readily permits state regulation of commercial affairs." 468 U.S. at 635.

Boy Scouts and Rotary are certainly not economically or commercially oriented within the standards contemplated by Justice O'Connor.

### III

#### **THE COURT SHOULD PREVENT THE IMPERMISSIBLE CHILLING OF FIRST AMENDMENT ASSOCIATIONAL RIGHTS.**

This Court repeatedly has recognized that "standards of permissible statutory vagueness are strict in the area of free expression," and "the government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 432-33 (1963). The reason for this rule is apparent:

"[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Id.* at 433.

The California public accommodations statute, as interpreted by the California Courts, lacks such specificity. While limited by its terms to "business establishments," the statute has been extended to cover some noncommer-



cial entities as well.<sup>6</sup> The California Supreme Court has further deprived that term of specific meaning by expressly reserving judgment as to whether it includes any and all associations serving a particular sex or age group.<sup>7</sup> In addition, the state's prohibition of "arbitrary" discrimination of any kind"<sup>8</sup> without a meaningful definition of that highly subjective term leaves associations without any assurance that their Constitutional rights will be protected. As a result, lawsuits such as those brought against Rotary and Boy Scouts are "chilling" the First Amendment associational rights of organizations in California. The Court must act to protect those rights by either striking down the California statute as impermissibly vague and overbroad *or* by confirming in the strongest possible terms the Constitutional protections to be afforded the rights of intimate and expressive association. Only then will the First Amendment freedoms of Boy Scouts, Rotary and others have the necessary "breathing space to survive." *Id.* at 433.

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<sup>6</sup>*Curran v. Mount Diablo Council of Boy Scouts*, 147 Cal. App. 3d 712, 732-33, 195 Cal. Rptr. 325 (1983).

<sup>7</sup>*Isbister v. Boys' Club of Santa Cruz*, 40 Cal. 3d 72, 82 n. 8, 707 P.2d 212, 219 Cal. Rptr. 150 (1985).

<sup>8</sup>*Id.* at 86.

## CONCLUSION

The judgment of the California Court of Appeal should be reversed.

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, *et al.*,

*Appellants,*

v.

ROTARY CLUB OF DUARTE, *et al.*,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT

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**BRIEF AMICUS CURIAE OF THE ANTI-DEFAMATION  
LEAGUE OF B'NAI B'RITH IN SUPPORT OF APPELLEES**

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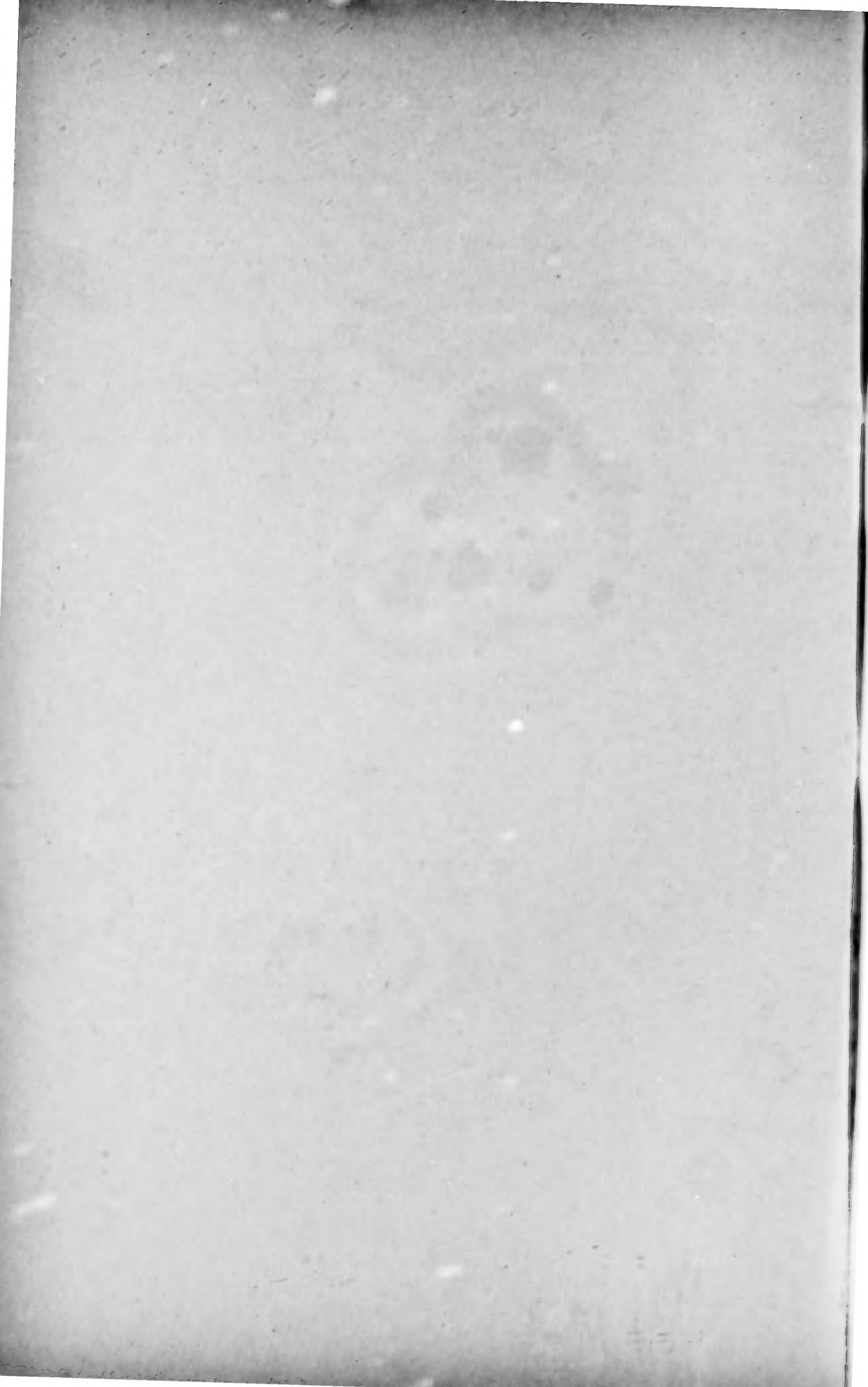
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## QUESTIONS PRESENTED

1. As business establishments subject to the requirements of §51 of California's Unruh Civil Rights Act, are Rotary International and the Rotary Club of Duarte prohibited from withholding full and equal accommodations, facilities, privileges and services on the basis of sex?

2. Does the application of §51 of the Unruh Act to Rotary International infringe upon its first amendment freedom of intimate and expressive association even though it is a large business enterprise with unselective membership criteria?

3. Is §51 of the Unruh Act vague and overbroad?

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

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No. 86-421

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BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, *et al.*,  
*Appellants,*

v.

ROTARY CLUB OF DUARTE, *et al.*,  
*Appellees.*

ON APPEAL FROM THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT

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**BRIEF AMICUS CURIAE OF THE ANTI-DEFAMATION  
LEAGUE OF B'NAI B'RITH IN SUPPORT OF APPELLEES**

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**CONSENT OF THE PARTIES**

All parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

**INTEREST OF THE AMICUS CURIAE**

For over seventy years, the Anti-Defamation League of B'nai B'rith has pursued the objective set out in its charter "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." Among its activities directed to these ends, the Anti-Defamation League has fought steadfastly to remove those discriminatory barriers which have prevented individuals from fully enjoying their rights as guaranteed by the Constitution. The League has filed *amicus* briefs in the areas of housing, employment, and education in such cases as *Shelley v. Kraemer*, 334 U.S. 1

(1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1 (1973); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); and *Local No. 93, International Association of Firefighters, AFL-CIO C.L.C., v. City of Cleveland*, \_\_\_ U.S. \_\_\_, 106 S. Ct. 3063 (1986).

Additionally, the League was a party in *Pines v. Tomson*, 160 Cal. App. 3d 370, 206 Cal. Rptr. 866, *as modified*, 160 Cal. App. 3d 1086(b) (Cal. App. 2 Dist. 1984), where similar issues regarding the applicability and constitutionality of §51 of the California Unruh Civil Rights Act were raised. In the context of religious discrimination, the League argued that the term "business establishment" encompassed the publishers of a discriminatory business directory and that application of the statute to the publishers did not violate their rights of freedom of association.

Combatting gender discrimination under the Unruh Act is no less compelling. As more women enter the work force, discriminatory policies based on stereotypical notions designed to bar women from entering into and advancing in the business world will be challenged. The Court is presented with the opportunity to uphold the ruling of the California courts in removing one of the many obstacles faced by women and minorities on their road to equality. Since the League is able to bring to the issues before the Court the perspective of a national human rights organization dedicated to the safeguarding of all persons' civil rights, it respectfully offers this Court its accumulated expertise with the issues raised by this case.

## STATEMENT OF THE CASE

*Amicus* incorporates the statement of the case as set forth in the Brief for Appellees.

## SUMMARY OF ARGUMENT

This case raises the question of whether an organization termed a "business establishment" under California's Unruh Civil Rights Act, Cal. Civ. Code §51 (West 1959) (the "Unruh Act"), can discriminate on the basis of sex. The Unruh Act flatly prohibits such discrimination, and appellants' first amendment associational rights do not outweigh that prohibition.

The California Court of Appeal, interpreting California law, has held that Rotary International ("International") and the Rotary Club of Duarte ("Duarte") display considerable "businesslike attributes" and are therefore business establishments under the terms of the Unruh Act. *Rotary Club of Duarte v. Board of Directors of Rotary International*, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (Cal. App. 2 Dist. 1986). That holding stands as a matter of state law, because the California Supreme Court denied International's petition for review. Appellants' Jurisdictional Statement, Appendix at D-1. As business establishments, International and Duarte must afford women "full and equal accommodations, facilities, privileges, and services," including the privilege of membership. Cal. Civ. Code §51.

Appellants' argument that the admission of women would violate their constitutional freedom of intimate and expressive association is without merit. Three years ago, this Court explicitly rejected the same contention in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), a case which is directly on point and dictates the outcome here.

The *Roberts* Court found the Jaycees, an organization of 7,400 local chapters and approximately 295,000 members, clearly "outside of the category of relationships" worthy of the Constitution's protection of intimate association. *Roberts*, 468 U.S. at 620. Rotary International, which comprises a global federation of more than 19,000 clubs with a membership close to one million, is hardly more intimate than the Jaycees. Indeed, in its "size, purpose, policies, selectivity, [and] congeniality," the factors considered relevant by this Court, International is virtually indistinguishable from the Jaycees. *Roberts*, 468 U.S. at 620.

Regarding International's freedom of expressive association, the compelling state interest served by the Unruh Act's prohibition of discrimination on the basis of sex unquestionably justifies any lim-

ited infringement. As in *Roberts*, the compelling interest is unrelated to the suppression of ideas, and cannot be achieved through means significantly less restrictive of associational freedoms. *Roberts*, 468 U.S. at 623.

Appellants' challenge to the Unruh Act as vague and overbroad must also fail. The Act is neither vague nor overbroad; its meaning and application are unmistakable, and its sweep is plainly legitimate. The Unruh Act is constitutional on its face and as applied, and therefore International and Duarte must abide by its provisions.

## ARGUMENT

### **I. Rotary International And The Rotary Club of Duarte Are Business Establishments Within The Meaning Of California's Unruh Civil Rights Act, And Are Therefore Prohibited From Discriminating On The Basis Of Sex.**

California's Unruh Civil Rights Act, Cal. Civ. Code §51 (West 1959) (the "Unruh Act"), prohibits business establishments from discriminating on the basis of sex. The Unruh Act, which governs this case, specifically provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Emphasis added.)

#### **A. In Determining Whether Rotary International And The Rotary Club Of Duarte Are Business Establishments Under California Law, This Court Is Bound By The Relevant Rulings Of California Courts.**

This Court has consistently recognized that "state courts provide the authoritative adjudication of questions of state law." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, \_\_\_, 105 S. Ct. 2794, 2804 (1985), O'Connor, J., concurring. In this case, whether Rotary International ("International") and the Rotary Club of Duarte ("Duarte") are "business establishments" within the meaning of the Unruh Act is a question of state law. It is a question which has already been resolved in state court, with due consideration to judicial precedent and to the statute's language and legislative history.



Since the court below has explicitly found that both International and Duarte are business establishments within the meaning of the Unruh Act and that finding is supported by the evidence, see Section B, *infra*, this Court can and should accept the proposition that the Unruh Act applies to them.

Appellants themselves do not list the applicability of the Unruh Act as one of the "questions presented" in this case. Nevertheless, their brief attempts to distinguish their procedures and objectives from those of other organizations previously considered "business establishments" by this Court and by California courts. This effort at misdirection is contradicted by the evidence, and must be rejected.

### **B. The Evidence Supports The Lower Court's Finding That International And Duarte Are Business Establishments Under California Law.**

Since the Unruh Act was adopted in 1959, its reference to "all business establishments of every kind whatsoever" has consistently been read broadly. *Rotary Club of Duarte v. Board of Directors of Rotary International*, 178 Cal. App. 3d 1035, 1047, 224 Cal. Rptr. 213, 219 (Cal. App. 2 Dist. 1986); *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 795, 662 P.2d 427, 191 Cal. Rptr. 320 (1983).<sup>1</sup> It has been applied to nonprofit organizations and organizations with "businesslike attributes." *Rotary Club*, 178 Cal. App. 3d at 1049, citing *O'Connor*, 33 Cal. 3d at 796. Its legislative history supports a broad reading, see *Rotary Club*, 178 Cal. App. 3d at 1047; *O'Connor*, 33 Cal. 3d at 796; *Burks v. Poppy Construction Co.*, 57 Cal. 2d 463, 468 (1962), and a similar interpretation has been given to it by the state's highest law enforcement official, the Attorney General of California. 34 Ops. Cal. Atty. Gen. 230 (1959).

<sup>1</sup> Several recent California appellate court decisions illustrate the broad manner in which the term "business establishment" has been construed. For example, in *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, a nonprofit homeowners' association was regarded as a business establishment prohibited from discriminating on the basis of age. In *Curran v. Mount Diablo Council of the Boy Scouts*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (Cal. App. 2 Dist. 1983), a homosexual excluded from the Boy Scouts stated a cause of action under the Unruh Act because of the Boy Scouts' "businesslike attributes." Similarly, in *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985), the court held the Boys' Club of Santa Cruz is a business establishment under the Unruh Act which cannot exclude girls.

Unruh does not apply, according to the California Supreme Court, to "relationships which are *truly private*." *Rotary Club*, 178 Cal. App. 3d at 1058, citing *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 84 n.14. (Emphasis added.) A "truly private" relationship has been characterized as "continuous, personal and social," taking place "more or less outside public view." *Rotary Club*, 178 Cal. App. 3d at 1058.

Examining International, an organization of clubs rather than individuals, the court below noted that membership "is far from continuous, personal and social," and most of its activities "clearly take place in 'public view.'" *Rotary Club*, 178 Cal. App. 3d at 1058-1059. According to the court, "its businesslike attributes are readily apparent from a brief overview of its organizational structure as well as certain of its administrative and financial concerns." *Id.* at 1051.

Rotary International's organizational structure closely resembles that of a large corporation, with a board of directors, officers, an international staff of 350, and a central office with six separate divisions. It has committees to oversee investments and other financial activity, it reimburses leaders for expenses incurred in furthering Rotary business, and it raises money in part from dues, which are tax deductible. Rotary also sells publications, subscriptions, and advertising, and has developed a license fee and royalty procedure for the use of its emblem. Rotary's regional offices operate as businesses, renting office space and purchasing necessary supplies.

Membership in Rotary Clubs such as Duarte also clearly has commercial significance. The court below compared International's proclaimed policy, which prohibits attempts "to use the privilege of membership for commercial advantage," with the practice of club members, several of whom offered testimony. *Rotary Club*, 178 Cal. App. 3d at 1056. The court's conclusion was that the evidence "leaves no doubt that business concerns are a motivating factor in joining local clubs . . . there are business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers." *Id.* at 1057. These business advantages, the court noted, were not merely incidental. *Id.* at 1058. "By limiting membership in local clubs to business and professional leaders in the community, International has in effect provided a forum which encourages business relations to grow and which enhances the commercial advantages of its members." *Id.*

From the state court's findings that the business advantages Rotarians enjoy are not merely incidental must flow the conclusion that women prohibited from joining clubs are at a disadvantage in the marketplace. Since one of the purposes of the Unruh Act was to prevent precisely such situations, its application here is appropriate and necessary.

**C. As A Business Establishment In California, Duarte Was Obligated To Open Its Doors To Women.**

Rotary International's operations in Duarte and elsewhere in California have sufficient businesslike attributes to be considered business establishments under the Unruh Act. Moreover, the admission of women would not cause the downfall of Duarte and International, or even seriously interfere with their objectives. *Rotary Club*, 178 Cal. App. 3d at 1060.<sup>2</sup> Consequently, they cannot discriminate against women, and the permanent injunction against enforcement of the male-only membership restriction must be upheld. Moreover, the Rotary Club of Duarte cannot be expelled from Rotary International for abiding by California's prohibition of discrimination on the basis of sex.

**II. International's First Amendment Associational Rights Were Not Abridged By The Striking Down Of International's Male-Only Membership Policy Pursuant To California's Unruh Civil Rights Act.**

A finding that International and Duarte are business establishments covered by the Unruh Act requires the Court to consider whether International's first amendment associational rights were abridged by the application of the Act to compel International to modify its rules to accept women as regular members. This Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), established the framework for reviewing claims of deprivations of associational rights. While International argues that the case at bar is distinguishable from *Roberts*, thus requiring a different result, *amicus*

<sup>2</sup> It is equally clear that the admission of women as regular members will not burden male members' freedom of expressive association in terms of the content of their speech. International is still free to adhere to its agenda of promoting "fellowship in service" for businesspersons and professionals. There is nothing in the record to indicate that female members would attempt to change the basic character of the organization.

disagrees. The associational rights of International and Duarte, like those of the Jaycees, have not been abridged.

In *Roberts*, this Court was confronted with a "conflict between a state's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization." 468 U.S. at 612. The United States Jaycees is a nonprofit national membership service organization with approximately 295,000 members in 7,400 local chapters with 51 state organizations; its sole criteria for full membership were sex and age—it was open only to males between the ages of 18 and 35. The Jaycees challenged the application to them of the Minnesota Human Rights Act which forbade discrimination on the basis of sex in places of public accommodation, requiring them to admit women to local chapters in Minnesota.

Justice Brennan, writing for the majority in *Roberts*, addressed the Jaycees' claim that the application of the Minnesota Human Rights Act to require the acceptance of females as full voting members violated the Jaycees' first amendment associational rights. Justice Brennan stated that the freedom of association encompasses two distinct rights: freedom of intimate association and freedom of expressive association. It is the position of *amicus* that neither component of International's freedom of associational rights was violated.<sup>3</sup>

#### **A. The Attributes Of International And Duarte Render Them Business Establishments With Limited Rights Of Freedom Of Intimate Association.**

In explaining the right of freedom of intimate association in *Roberts*, Justice Brennan noted:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford

<sup>3</sup> The Unruh Act has previously been examined in light of freedom of association concerns. In *Pines v. Tomson*, 160 Cal. App. 3d 370, 206 Cal. Rptr. 866, *as modified*, 160 Cal. App. 3d 1086(b) (Cal. App. 2 Dist. 1984), the California Court of Appeal ruled that the publishers of a discriminatory business directory were a business establishment. Applying the *Roberts* test, the court further concluded that the publishers were not deprived of their freedom of associational rights by the application of the Act to them.

the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. *E.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). (Parallel citations omitted).

468 U.S. at 618.

As an example of the types of relationships entitled to protection, the *Roberts* Court turned to family relationships which

by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.

468 U.S. at 619-20. The Court concluded:

[O]nly relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection.

468 U.S. at 620.

In determining where a particular relationship falls on the continuum from "the most intimate to the most attenuated of personal attachments," *Roberts*, 468 U.S. at 620, the Court noted relevant factors including "size, purpose, policy, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.* The Court expressly declined to identify significant milestones on the vast territory between the ends of the spectrum.

It has already been shown that the lower court in this case relied on the above-cited factors to conclude that International and Duarte are "business establishments" under the Unruh Act. Thus, it logically follows that International's freedom of intimate association is not immune from incursions by the state.



International maintains, *inter alia*, that its selective membership procedures shield it from government intrusion. Appellants, however, provide the Court with an incomplete picture of the selectivity in membership, recruitment policies and the degree of privacy and congeniality maintained at weekly meetings and other functions. Local clubs seek out members who are area businessmen or professionals. Using classified telephone directories and other business directories, each club is mandated to "prepare annually a classifications survey of its locality and compile from such survey a roster of filled and unfilled classifications as the logical basis for building a balanced club membership representing a true and broadly-based cross section of the business and professional life of the locality." Rotary Manual of Procedure, Joint Appendix at 64-65. As such, all businessmen and professionals are welcome. While clubs seek "well-balanced" memberships, with no particular group dominating the ranks, there are no limitations on the representatives from the news media, religious groups and the diplomatic corps.

In addition, clubs are instructed to expand and to recruit new members. Prospective members may attend several meetings before being asked to join.<sup>4</sup> Students are also invited to attend Rotary functions, even though no student memberships are offered. Contrary to International's assertions, members of the public are invited to attend meetings. In fact, according to the Manual of Procedure, the Board of International recommends that local clubs make a special effort to urge individual members to invite guests to weekly Rotary meetings. Joint Appendix at 39. Also, "[e]mployees, competitors, customers and salesmen are invited by members casually or on special 'days' to the Rotary Club meetings." Joint Appendix at 24. Joint meetings with other service clubs are permitted as are joint service programs. Furthermore, the Board of International explicitly recognizes groups comprised of female relatives of Rotarians organized "for the purpose of having among their objectives the sup-

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<sup>4</sup> Local clubs are encouraged to erect signs in their areas indicating their presence in the community. This is certainly a not-too-subtle method of culling new members.



port of Rotary Club activities." Joint Appendix at 68. Male members and female auxiliary members may also wear Rotary pins on their lapels. *Id.*<sup>5</sup>

By requiring attendance at weekly meetings and allowing Rotarians to attend a club meeting anywhere in the world, International undermines its own arguments about size, selectivity and congeniality. If, in addition to guests and prospective members, out-of-town members attend meetings, local clubs and International rapidly lose those attributes which would compel this Court to provide protection for their freedom of intimate association.<sup>6</sup>

In its attempt to differentiate its attributes from those of the Jaycees, International asserts that its principal purpose is "fellowship in service." As will be explained in more detail *infra*, Rotary's activities and the business benefits flowing from them completely eclipse its stated purpose, making it more of a business entity than a private service organization.

Finally, International seeks protection of its freedom of intimate association by this Court on the grounds that "Rotary's male-only membership is prized both because it enhances the fellowship which is at the heart of Rotary, and because it enables Rotary to operate effectively throughout a world of varied cultures and mores." Brief for Appellant at 22. As to the legitimacy afforded such private discrimination cloaked in the guise of "fellowship," Chief Justice

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<sup>5</sup> The Rotary Manual of Procedure offers the reasons for Rotary acknowledgement of women's auxiliary groups as:

1. appreciation of "the valuable cooperation and participation of women relatives of Rotarians . . . in the community service and other activities of Rotarians and Rotary clubs;"
2. recognition that "women are becoming more and more involved in public service of all kinds;" and
3. awareness of "the interest manifest by women relatives of Rotarians in some communities in associating themselves for the purpose of service work in cooperation with and in support of the service activities of Rotary clubs." Joint Appendix at 68.

<sup>6</sup> In view of the fact that Rotary International boasts in excess of 19,000 clubs with close to one million members in 157 countries and has an extensive administrative and financial apparatus, its limited freedom of intimate association does not shield it from government regulation.

Burger, in *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1970), stated that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been afforded affirmative Constitutional protections." See also, *United States Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d 401, 414, 465 N.Y.S.2d 871, 877 (1983).<sup>7</sup> Therefore, this argument must fail.

International's plea not to disturb a discriminatory membership policy that works to its advantage outside the United States must also be dismissed. While International is free to fashion whatever rules it wants outside the United States, it cannot call upon this Court to protect those interests which are contrary to United States law. Any attempt to ask this Court to ignore its duties and responsibilities under the Constitution in order to protect a discriminatory policy practiced outside the United States reveals a basic lack of understanding of our judicial system.

Since local clubs are lax in their membership qualifications, invite guests and members of other locals to weekly meetings, encourage recruitment of new members, and allow women auxiliary groups to participate in their activities, they "lack the distinctive characteristics that might afford Constitutional protection to the decision . . . to exclude women." *Roberts*, 468 U.S. at 621.

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<sup>7</sup> The California Court of Appeal in *Curran v. Mount Diablo Council of the Boy Scouts*, responding to the Boy Scouts' claim of abridgement of freedom of association rights, similarly noted that

those with a common interest may associate exclusively with whom they please only if it is the kind of association which was intended to be embraced within the protection afforded by the rights of privacy and free association.

147 Cal. App. 3d 712, 730.

**B: The State Of California's Interest In Eradicating Discrimination Is A Compelling One Which Outweighs International's Freedom Of Expressive Association.**

International further maintains that bringing it within the purview of the Unruh Act abridges its rights of freedom of expressive association. An examination of the appropriate balancing test yields the conclusion that no such abridgement has occurred.

In *Roberts*, Justice Brennan stated that the individual rights contained in the first amendment

to speak, to worship, and to petition the Government for redress of grievances could not be vigorously protected from interference by the state unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends.

468 U.S. at 622 (citations omitted).

While there is no question that International's right has been implicated, it is equally clear that this right is not absolute and that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedom." *Roberts*, 468 U.S. at 623 (citations omitted). As noted by the California Court of Appeal in *Pines v. Tomson*, 160 Cal. App. 3d at 392, "California's interest in eradicating discrimination on the basis of . . . sex is unquestionably 'compelling.'" (Citing *Roberts*, 468 U.S. at 623.)

As with the Minnesota statute in *Roberts*, §51 of the Unruh Civil Rights Act was enacted to eliminate all forms of invidious discrimination in places of public accommodation throughout the State of California. "That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order." *Roberts*, 468 U.S. at 624. As Chief Justice Bird of the Supreme Court of California stated in *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 34, 707 P.2d 195, 219 Cal. Rptr. 133 (1985), where the court struck down gender-based discounts, "[m]en and women alike

suffer from the stereotypes perpetrated by sex-based differential treatment."<sup>8</sup>

Hoping to avoid the result in *Roberts*, International further attempts to distinguish itself from the Jaycees by arguing that the Jaycees "sold" memberships to the public. However, the reach of *Roberts* cannot be read so narrowly. Justice Brennan stated categorically that "the state interest in assuring equal access [is not] limited to the provision of purely tangible goods and services." *Roberts*, 468 U.S. at 625. An expansive view of the rights of public access "reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." 468 U.S. at 626 (citations omitted). Advantages, facilities, privileges and services protected by the Unruh Act include the development of leadership and management skills and business contacts.

Although International insists that Rotary is a service organization for professionals and businessmen and is not a public commercial organization with incidental associational rights, this is simply not the case. Membership in a local club provides advantages, facilities, privileges, and services such as opportunities to attend business relations conferences where members can learn management techniques to help improve their own business and professional skills. In addition, Rotarians are mandated to instruct their fellow Rotarians about their professions and business practices. As

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<sup>8</sup> Quoting from Kanowitz, *Women and The Law* (1969), p. 4, Chief Justice Bird continued that when the law

emphasizes irrelevant differences between men and women[,] [it] cannot help influencing the content and the tone of the social, as well as the legal, relations between the sexes. . . . As long as organized legal systems, at once the most respected and most feared of social institutions, continue to differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote. When men and women are prevented from recognizing one another's essential humanity by sexual prejudices, nourished by legal as well as social institutions, society as a whole remains less than it could otherwise become.

40 Cal. 3d at 34-35.

a condition of membership, Rotarians must subscribe to an official Rotary magazine, which contains information and advice relating to business management. Even though Rotarians are precluded from using their Rotary membership for business advantages, exposure to and interaction with other businessmen and professionals can only enhance one's knowledge of the marketplace and contacts in the business community. Moreover, members of local clubs regard Rotary activities as business-related and treat their dues as business deductions. Such business activity is hardly incidental to the stated purpose of Rotary to promote "fellowship in service."

Finally, even if enforcement of the Unruh Act does incidentally abridge International's speech, "that effect is no greater than is necessary to accomplish the state's legitimate purposes." *Roberts*, 468 U.S. at 628. As Justice Brennan further noted,

like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, [acts of invidious discrimination in the distribution of publicly available goods, services and other advantages] are entitled to no constitutional protection.

468 U.S. at 628.

### **III. The Unruh Act Is Neither Vague Nor Overbroad, And Its Constitutionality Should Be Affirmed.**

#### **A. Vagueness.**

The language, legislative history, and court interpretations of the Unruh Act, taken together, leave no doubt as to what the Act prohibits or to whom it applies. This Court must therefore reject appellants' transparent attempt to evade compliance by asserting that the Act is too vague.

A statute may be considered void for vagueness when it "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Roberts*, 468 U.S. at 629, citing *Connally v. General Construction Co.*, 269 U.S. 385 (1925). The *Roberts* case, discussed in detail in Section II, *supra*, included a challenge by the Jaycees to Minnesota's civil rights statute on vagueness grounds. The Court explicitly rejected that challenge, observing that the Minnesota Supreme Court had used a number of "specific and objective criteria" in deciding that the Act reached the Jaycees. *Roberts*, 468 U.S. at 629. These criteria, regarding the or-



ganization's "size, selectivity, commercial nature, and use of public facilities," are the criteria "typically employed in determining the applicability of state and federal anti-discrimination statutes to the membership policies of assertedly private clubs." *Roberts*, 468 U.S. at 629.

The lower Court in the instant case relied on similar criteria in holding the Unruh Act applicable to International and Duarte. See *Rotary Club*, 178 Cal. App. 3d at 1063-1064. Once applicable, the Act's meaning is unmistakable; no guesswork is necessary to understand that women cannot be excluded from the Rotary Club of Duarte.

### B. Overbreadth.

Appellants' challenge to the Unruh Act on overbreadth grounds must also fail. On its face and as applied, the Act not only has a plainly legitimate sweep, but also serves a compelling state interest.

Assuming arguendo that the statute could infringe upon certain associational freedoms, such infringement would not suffice to render it unconstitutional. See Section II-B, *supra*. The statute clearly addresses conduct as well as speech, and this Court has stated:

[W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that [the statute in question] is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

*Broadrick v. Oklahoma*, 413 U.S. 601, 615-616 (1973).

The statute at issue in *Broadrick*, an Oklahoma statute regulating political activity by state employees, survived a challenge on overbreadth grounds even though its impact on free speech rights was considerably greater than the Unruh Act's impact on first amendment rights in the instant case.<sup>9</sup> Consequently, as applied to International and Duarte, the Unruh Act is not overbroad.

<sup>9</sup> In *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2802 n.12, this Court noted that the *Broadrick* "substantial overbreadth requirement" is applicable even when pure speech rather than conduct is at issue. See also, *New York v. Ferber*, 458 U.S. 747, 772 (1982).



## CONCLUSION

For the foregoing reasons, *amicus* urges this Court to affirm the decision below prohibiting Rotary International from discriminating on the basis of sex.

As a civil rights organization devoted to combatting discrimination and seeking justice and fair treatment for all, *amicus* believes the Unruh Civil Rights Act has contributed significantly to achieving equal rights for women and minorities, while respecting the privacy rights of legitimately private clubs. An affirmance would not only serve the interests of justice in this case, but would also underscore the importance of the Act as a major force in eradicating discrimination in the State of California.

Respectfully submitted,

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10  
No. 86-421

Supreme Court, U.S.

FILED

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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

BOARD OF DIRECTORS OF  
ROTARY INTERNATIONAL, et al.,

Appellants,

v.

ROTARY CLUB OF DUARTE, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA,  
SECOND APPELLATE DISTRICT

Brief of Lloyd Lions Club  
As Amicus Curiae In  
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Lloyd Lions respectfully submits this brief as amicus curiae in support of appellees, Rotary Club of Duarte, et al. Written consent of the parties is submitted with this Brief.

#### INTEREST OF AMICUS

Lloyd Lions Club is a non-profit Oregon corporation. Prior to 1981, Lloyd Lions was a chartered member, in good standing, of the International Association of Lions Clubs. During June and July of 1981, Lloyd Lions invited two women to join as members. Both women accepted the invitation and were duly admitted. The International Association of Lions Clubs then revoked Lloyd Lions Charter, effective October 5, 1981, due to its admission of the two women as members. The International relied upon its Constitution which requires that members be males over the age of eighteen and of good moral character.



Lloyd Lions instituted legal proceedings alleging that the International's action in revoking its charter violated the Oregon Public Accommodations Act, ORS 30.680, et seq. That state law is similar to the Unruh Act, Cal. Civ. Code §51, at issue here, in that the Oregon statute prohibits discrimination by places of public accommodation on the same prohibited bases of sex, race, color, religion, ancestry and national origin. The Oregon Supreme Court has construed the term "public accommodation" to be a business or commercial enterprise.

The Court of Appeals upheld the trial court's rulings that the International (1) was a business or commercial enterprise and therefore subject to the state law, and (2) had violated the state law by revoking Lloyd Lions' charter solely because it had admitted women as members. The case is presently pending before the Oregon Supreme

Court.

The same constitutional issues which have been raised by appellant in the present case, have been raised by the International Association of Lions Clubs in the litigation in which it is involved with this amicus. Due to the similarities of issues, the present case has great potential significance to the Lions litigation.

#### ARGUMENT

In the present case, Rotary International is in the position of arguing that the federal constitution protects the right of individual members of local Rotary Clubs to associate with others of their own choosing; while itself denying this right to members of the Rotary Club of Duarte. Rotary International seeks to persuade this Court that the State of California is interfering with its freedom of association, yet the "association" is nothing more than sex discrimination. This Court has stated in another context, that "'the constitution . . . places no value on discrimination'

[citation omitted] and while 'invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.'" Runyon v. McCrary, 427 U.S. 160, 174 (1976)(citing Norwood v. Harrison, 413 U.S. 455). Thus, in Runyon, this Court held that while a nonsectarian, commercial school's right to promote the belief that blacks should be excluded from the school has First Amendment protection, "it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle." Id., at 176. Similarly, while Rotary International's belief that women should be excluded from membership may be protected under the First Amendment, its practice of compelling a local club, against its wishes, to exclude

women is of the same type of invidious private determination which this Court said "has never been accorded affirmative constitutional protections." 427 U.S. at 176.

The fact that Rotary International's belief and practice conflict with the belief and practice of Rotary of Duarte, raises another point. Rotary International is an association of local clubs. An individual belongs not to Rotary International, but rather to a local club. It is the Clubs, as entities which are members of Rotary International. However, the international association claims to be asserting the right of individual members to exclude women. The individual members whose associational rights are at stake in the present litigation, however, are the members of Rotary of Duarte, and they are seeking to protect their right to associate with women in pursuit of Rotary objectives.

And from the record, it appears that in 1980, 40% of the member clubs agreed with Rotary of Duarte, that local clubs should be permitted to admit women. (Brief of Appellant, p. 11). Thus, a sizeable minority of member clubs disagrees with the position of Rotary International. More significantly, however, the individuals directly involved in the present proceedings are individuals whose wish to associate with women is being denied by Rotary International. This is not a case where women members have been forced upon a club whose male members did not wish to associate with them. The men of Rotary of Duarte invited the two women members to join.

Thus, to the extent that Rotary International claims to assert the associational interests of individual members, it must be remembered that as long ago as

1980, there was no broad consensus among those members on the issue of the exclusion of women. Further, Rotary International's practice of compelling obedience to its requirement of excluding women directly interferes with the right of local clubs and their members to associate with women in their Rotary activities.

A separate, but somewhat related issue is the nature of the associational interest which Rotary International claims has been infringed. In Roberts v. United States Jaycees, 468 U.S. 609 (1984), this Court identified two different types of the constitutionally protected right of association: freedom of intimate association and freedom of expressive association. The type of intimate association which has traditionally been regarded as deserving of constitutional protection was outlined by the Court in Roberts. 468 U.S. at 618-620.



The personal affiliations included in this type are characterized by relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation and seclusion from others in critical aspects of the relationship. Id., at 620.

It would seem that freedom of intimate association is meaningless in the context of an asserted right of member clubs to associate with other member clubs and to exclude clubs with women members. First and foremost, this is due to the size of the association. Nearly 20,000 local clubs belong to Rotary International. (Brief of Appellant, p. 7). Further, there is no evidence that clubs interact to any great extent, other than through their common membership in the parent organization. If the relevant association is considered as that of all the individual members of all the local clubs, it is

likewise meaningless to speak of protecting intimate association among 907,750 members.

Thus, if Rotary International is to rest its claim to protection on the concept of intimate association, it must look to the individual members of an individual club, each grouping of each club, separate from the others. For only in this regard could it be plausibly argued that there are personal bonds among individuals of the type constitutionally protected. However, it is precisely here, that Rotary International's argument must fail. For the effect of its practice of compelling obedience to its rule of exclusion of women, is to seriously interfere with the associational rights of those individuals, who acting in concert, have asserted their right to associate with women in pursuit of their common, Rotarian goals. By cloaking its action in the guise of freedom

of association, Rotary International seeks to use constitutional safeguards - not as a shield - but as a sword, to enforce its right to discriminate against women, in some cases, irrespective of the wishes of the local club. To hold that Rotary International's exclusion of women is constitutionally protected intimate association, would be to afford the affirmative constitution protection to the very type of invidious discrimination condemned by this Court in Runyon.

The second type of protected association described by the Roberts court is freedom of expressive association, which the Court characterized as the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. 468 U.S. at 622.

However,

"the right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."

Id., at 623.

The State of California has a compelling interest in the eradication of sex discrimination by business establishments within its borders. To that end, it adopted the Unruh Act, Cal. Civ. Code §51. The Act does not on its face, suppress speech or distinguish prohibited from permitted activity on the basis of viewpoint. Nor does application of the Act to Rotary International seriously interfere with the male members' expressive association. Men who do not believe women should

be admitted to Rotary, may freely express that opinion and are in no way required to invite women to join their clubs. Moreover, it is important to bear in mind that the purpose for which Rotarians have joined together is "to encourage and foster the ideal of service as a basis of worthy enterprise" (Brief of Appellant, p. 9), and this laudable purpose is not interfered with when a local club admits two service-minded women. Nor can it be seriously maintained that only by excluding women, can Rotary International maintain its effectiveness as a worldwide service organization. Despite Rotary International's attempt to imply that other, unspecified cultures would not accept the idea of women members, there is no concrete evidence that membership would decline or that recipients would refuse aid simply because some clubs had chosen to admit

women. Finally, it should be remembered that membership in a Rotary Club is by invitation. The California Court of Appeals decision does not require that all California Rotary Clubs admit any women who request membership. Rather it prohibits Rotary International from excluding a local club, which has itself decided to invite women as well as men into membership.

#### CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Court of Appeals of the State

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of California.

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IN THE

**Supreme Court of the United States**

October Term, 1986

BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

*Appellants,*

*v.*

ROTARY CLUB OF DUARTE, et al.,

*Appellees.*

Appeal from the Court of Appeal of the State of  
California, Appellate District

**BRIEF *AMICI CURIAE* OF THE AMERICAN  
JEWISH CONGRESS AND THE NATIONAL  
COUNCIL OF JEWISH WOMEN IN  
SUPPORT OF APPELLEES**

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INTEREST OF THE AMICI

The American Jewish Congress is an organization of American Jews founded in 1918. It is dedicated to the preservation of the security and constitutional rights of Jews in America and to ensuring the creative continuity of the Jewish people world-wide. It believes that the welfare of the Jewish people in the United States is inseparably linked to the health of democracy and to the elimination of invidious racial, religious and sexual discrimination from American life.

Among its many activities directed to these ends, the American Jewish Congress (AJC) has filed amicus curiae briefs in this Court in such cases dealing with associational rights and racial and sexual discrimination as Moose





Lodge No. 107 v. Irvis (1971); Runyon v. McCrary (1976) and Hishon v. King & Spalding (1984).

The AJC brings to the issues raised in this appeal the perspective of a national organization, selective in membership, with a particularist agenda dictated by that selectivity, yet one that is firmly committed to opposing racial, religious and sexual discrimination and assuring all citizens equal access to public goods and facilities.

The National Council of Jewish Women was founded in 1893. It has as its purposes, the support of education, community service, and advocacy in the areas of women's issues, children and youth, constitutional rights, aging, Jewish life and Israel.

This brief is submitted with the consent of the parties.



SUMMARY OF THE ARGUMENT

Roberts v. United States Jaycees

held that anti-discrimination statutes that require "service" organizations to admit women members do not violate the associational rights of the organization or of its male members if the organization is neither an intimate association nor an association whose expressive activity would be burdened by application of the anti-discrimination law. Rotary International and its member clubs fall squarely within the holding in the Jaycees case.

1. Jaycees identified two types of protected associational rights. The first, called by this Court the right of intimate association, turns on the right of a person to choose those with whom he



or she will enter into close personal relationships. The second, labelled the right of expressive association, turns on the by-now well recognized right of persons to join together to further ideological aims. Application of California's anti-discrimination law to the Rotary Club would violate neither right.

2. The state cannot constitutionally interfere in associations that reflect a high level of intimacy, or that parallel the smallness, closeness and exclusivity found in family relationships. Rotary shares none of these attributes. Rotary International is a huge world-wide organization. Even a local club must have at least 20 members that must reflect 20 separate business classifications, and must





actively solicit new memberships. Members of one local club can and do attend meetings at other clubs, and outsiders, including women, are invited to attend club meetings. Rotary meetings therefore are often attended by an anonymous group of people sharing none of the intimate and private characteristics of the family.

3. The state also cannot constitutionally interfere with associations whose membership policies are intended to further the expression of ideological positions. Those policies, therefore, are closely tied to the exercise of First Amendment free speech rights; and cannot be altered without impacting on the organization's ideology. Thus, an organization concerned with the interests of Jews is, as a matter of constitutional law, entitled to limit membership to Jews, and an organization interested in the rights of fathers could



limit membership to men. Rotary, however, does not generally engage in constitutionally protected expressive activities, and is even barred by its own charter from taking institutional positions on matters of public concern. Admitting women members could not, therefore, impact on the ideological stance of Rotary. Nor would admitting women as members alter the "service" objectives of Rotary were those objectives considered expressive in nature.

4. Even if Rotary had a marginal claim to a right of expressive association, the state would have a compelling interest in requiring Rotary to admit women sufficient in this case to outweigh that interest. Significant commercial and business advantages flow from membership in a Rotary club, and California, like Minnesota in the Jaycees case, has an overriding interest in



eradicating sex discrimination in the business and commercial sphere.

5. The mere fact that Rotary has some selectivity in membership does not automatically make it constitutionally immune from all state regulation. Selectivity in membership may reflect a closeness or intimacy, or, even in large associations, may promote a common expressive goal. The selectivity exercised by Rotary -- its business classification principle -- promotes neither intimacy nor furthers an organizational ideological purpose. It simply enhances the business and commercial benefit to be gained from joining Rotary. And there is nothing inherent in the business classification principle that requires the exclusion of women.

2



I. THIS CASE IS CONTROLLED BY ROBERTS  
v. UNITED STATES JAYCEES

In Roberts v. United States  
Jaycees<sup>1</sup> this Court held that application of the Minnesota Human Rights Act to compel a large non-selective association of male-only service clubs, engaged in a variety of civic, charitable and educational activities, to admit women as members did not abridge the associational rights of that male-only organization and its members.

In reaching this conclusion, the Court found various characteristics and attributes of the Jaycees to be decisive. The organization's large size, relative unselectivity in membership, and

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<sup>1</sup> 468 U.S. 609 (1984)



the participation of non-members, including women, in its activities, disqualified it from constitutional protection as an "intimate association." Roberts v. United States Jaycees, supra, 468 U.S.at 621. Further, Jaycees offered its members substantial commercial benefits: "[l]eadership skills..., business contacts and employment promotions". These commercial benefits made the Jaycees an appropriate subject of state regulation to insure equality of business opportunities for women and justified any impact which such regulation might have on Jaycees' right of expressive association. Id at 626-628.

These same characteristics and attributes characterize Rotary International and its local clubs



(hereafter Rotary) and dictate a similar result in this case.

A. Neither Rotary International nor any of its Member Clubs is an Intimate Association.

"The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation of certain kinds of highly personal relationships, a substantial measure of sanctuary from unjustified interference by the State." Roberts v. U.S. Jaycee, supra 468 U.S. at 618. The boundaries of that protected area are dictated by the nature of the relationships and values sought to be insulated from state intrusion.

Family ties, "those [relationships] that attend the creation and sustenance of a family -- marriage, childbirth, the raising and education of children and



cohabitation with one's relatives" 468 U.S. at 619, have been the principal beneficiaries of this constitutional shelter.<sup>2</sup> These relationships have been shielded from interference because they "involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life." Roberts v. Jaycees, supra 468 U.S. at 620.

Although the outlines of the right of intimate association beyond the family

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<sup>2</sup> Zablocki v. Redhail, 434 U.S. 374 (1978); Carey v. Population Services Int'l, 431 U.S. 678 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion).





have not been precisely delineated,<sup>3</sup>  
Roberts teaches that the relationships  
enjoying this right are characterized by  
such attributes as their relative  
"smallness, a high degree of selectivity  
in decisions to begin and maintain the  
affiliation and seclusion from others in  
critical aspects of the relationship".  
Id at 620. And it is also clear that  
"choices...that are 'private' in the  
sense that they are not part of a  
commercial relationship offered generally  
or widely and that reflect the  
selectivity exercised by an individual  
entering into a personal relationship..."  
Runyon v. McCrary, 427 U.S. 160, 189

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<sup>3</sup> Compare Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) with United States Department of Agriculture v. Moreno; 413 U.S. 528 (1973).



(1975) (Powell, J., concurring), stand on a preferred constitutional footing.

Where intimate associations, such as private clubs, have been protected it is because the relationships sought to be shielded are akin to those in a family. They "replicate the bonds of literal fraternity; the relationship among members is close, intimate and continuing. Its members having genuinely chosen each other as social intimates, the club functions as an extension of their homes."<sup>4</sup>

Judged by these standards, it needs little argumentation to conclude that Rotary International and local Rotary clubs are not entitled to protection as

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<sup>4</sup> Cornelius v. Benevolent Protective Order of Elks, 382 F.Supp. 1182, 1203 (D.Ct. 1974).



intimate associations. Rotary International is a world-wide federation of almost 20,000 individual clubs which in 1982 had a total membership of close to one million, almost four times the size of the Jaycees, distributed in 157 countries world-wide.<sup>5</sup> (J.S. App. B-2). While the average Rotary Club has about 50 members (J.S.App. G-15), no Rotary Club may be formed with fewer than 20 members representing 20 separate business classifications and a membership growth potential of at least 20 additional classifications (J.S. App. G-21). Membership in some clubs reaches as high as 900 men. (J.S. App. G-15).

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<sup>5</sup> Unless otherwise noted, record citations are to the Appellants' Appendix to the Jurisdictional Statement noted as J.S. App. A through G and to the Joint Appendix noted as J.A. \_\_\_\_.





Rotary International's "open door" policy, which permits a member of a local Rotary Club in one part of the world to fulfill his attendance "obligation" by "making up" meetings at other Rotary Clubs elsewhere in the United States or, indeed, in other parts of the world, (J.S.App. B-3 J.A. 85) underscores the relative anonymity and lack of either social cohesiveness or intimacy which characterize Rotary meetings. Some Rotary Clubs play host each week to ten or twenty members from other clubs (J.S.App. G-23-24). These are men whom the local club members have never seen before and may never see again. The transient, semi-anonymous relationships engendered by the brief luncheon or dinner meetings held at public restaurants (J.A. 39) and



advertised by road signs on the public highways (J.A.44) do not implicate any of the values attendant upon continuous close and private personal associations.

Rotary encourages attendance at meetings of guests, both membership prospects and individuals ineligible for membership, (J.A. 25, 39, 66) in order to increase membership and to publicize Rotary activities, Id. Rotary clubs also hold joint meetings with other service clubs (J.A. 39, 42).

Full representation of the local press in club membership is encouraged (J.A. 37) as well as cooperation and participation by women relatives of Rotarians in the organization's community service and other activities. J.A. 44-45). And Rotary's clubs are urged to



initiate extensive public relations efforts (J.A. 70-74) - to achieve public knowledge and understanding of Rotary's activities and to attract responsible business leaders to become members.

These activities denote not an "intimate association" secluded from others in critical aspects of their activities, but a large impersonal assemblage in which "much of the activity central to the formation and maintenance of the association involves the participation of strangers to the relationship." Roberts v. U.S. Jaycees, supra, 468 U.S. at 621.

Rotary International's encouragement of interchange of attendance at any Rotary chapter - and the impact of that policy on the asserted social cohesiveness of individual rotary clubs -



dooms Rotary's attempt to have this Court focus on the individual club rather than the entire Rotary organization. First, if this Court does so here, it is acting contrary to the wishes of the appellee local club which rejects Rotary's men-only policy. Second, and contrary to Rotary's contention, the local club is not a self-contained entity. Apart from the attendance of members from other clubs, over which the local club has no control -- it being required to play host to all transient Rotary members who seek admittance -- the over-all detailed policies and rules of Rotary are determined (J.A. passim; J.S. App. C-28, G-12) and enforced by Rotary International, and the selectivity which forbids membership to women is not





determined by any club, but by Rotary International.

Moreover, even were the intimacy of association to be measured by the local club alone, the result would not be different. Although the claim is made that "local Rotary clubs are selective in the admission of members," [in the sense that they pick and choose among eligible candidates for admission] and "that they operate in accordance with formal membership procedures; and admission is by vote of the members" (Appellants brief p.25), the record is totally barren of evidence that Rotary Club of Duarte or indeed any local Rotary Club has ever rejected or failed to vote in any candidate for membership on the basis of his personal qualifications or on any other basis.



This is not at all surprising in view of Rotary's commitment to and support of activities designed to extend Rotary "throughout the world," J.A.49-50, (J.S.App. (G-22)), and its concomitant emphasis on maintaining and enlarging local club membership. (J.A.61-67). In fact, it was to shore up its dwindling membership that appellees sought to recruit women (J.S.App. C-7). This emphasis on growth is wholly at odds with any notion of true membership choice and selectivity as well as with the concept of an intimate association.

Although they do not call their prospective members "customers" or characterize their membership as a product to be sold, Rotary clubs do engage in continuous, aggressive recruitment of new members. For each new



member, Rotary International receives per capita dues of \$17.00 and each Rotarian must become a paid subscriber to the official magazine published by Rotary International (J.A.56-57). Rotary clubs are admonished "not to establish arbitrary limits on the number of members in the clubs or fail to increase membership" (J.A. 62-63). The Rotary International Manual of Procedure sets forth an elaborate plan for ensuring membership growth: club membership is divided into groups of 5 members with each group responsible for securing one new member in the first six months of the Rotary year (J.A. 63).

Finally, a club of nearly 50 members consisting by conscious mandate of a cross-section of the business and professional community, (J.A. 36-37) see





p.27, infra, lacks almost by definition that intimacy and privacy akin to an extended family that Roberts v. U.S. Jaycees, supra, and its predecessors require before racial, religious or gender discrimination can, on that ground, be shielded by the Constitution from state regulation. Selectivity which must operate within such rigid occupational restraints clearly does not engender the emotional enrichment or self-identification which makes intimate associations worthy of such protection.

B. No Right of Expressive Association Is Infringed By Applying California's Anti-Discrimination Statute to Rotary

Just as this Court has recognized a right of intimate association "as an intrinsic element of personal liberty" Roberts v. U.S. Jaycees, supra, 468 U.S.



at 618, so too has it protected a right of expressive association: the right to join with one's fellows to pursue and by collective action amplify and make more effective the exercise of First Amendment freedoms. Roberts v. U.S. Jaycees, supra, 468 U.S. at 622 and cases cited. See also Tashjian v. Republican Party of Connecticut, 107 S. Ct. 544 (1986); NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963); Cousins v. Wigoda, 419 U.S. 477 (1975). See brief of American Jewish Congress in Corporation of Presiding Bishop v. Amos, Nos. 86-179, 86-401 at 27-30.



1. Rotary's Expressive Activities Are Limited.

In Roberts v. U.S. Jaycees, supra, a not insubstantial part of the Jaycees activities constitute[d] protected expression on political, economic, cultural and social affairs." "[O]ver the years, the national and local levels of the organization ha[d] taken public positions on a number of diverse issues" and "members of the Jaycees engaged in a variety of civic, charitable, lobbying and fundraising activities" worthy of constitutional protection. Roberts v. U.S. Jaycees at 627. However, there was no showing in the record that admitting women would change the "Jaycees philosophical cast" or "the message communicated by the group's speech". Id at 627.



Moreover, weighing these activities against the state's legitimate interests in eradicating the "unique evils" inherent in invidious sex discrimination, this Court held the "incidental abridgement" of Jaycees' protected rights to fall within the permissive ambit of state regulation.

Rotary's case for expressive association is far weaker than that of the Jaycees. In contrast to the situation presented in Roberts v. U.S. Jaycees, Rotary International and local Rotary Clubs, although they may discuss public concerns, are barred by their constitution and by-laws from taking positions on controversial public measures affecting the general welfare of the community, from endorsing political candidates, or even from circulating





resolutions, or taking any other institutional action on world affairs and international problems of a political nature. (J.A. 58-59). Thus, Rotary International and its local clubs engage in considerably less constitutionally protected expressive activity than did the Jaycees.

Nevertheless, since Rotary International does publish an official magazine as well as numerous books, manuals, pamphlets and audio visual materials and since Rotary members and clubs do engage in "civic, charitable and fund raising activities," expressive freedom is implicated to some extent in this case, although as noted, to a far lesser degree than in Roberts v. U.S. Jaycees, supra, 468 U.S. at 627.



2. Intrusion on Rotary's  
Speech is Minimal

Here too, as in Roberts v. U.S. Jaycees, no showing was made that application of the Unruh Act to Rotary International would impose any serious burdens on the male members' freedom of expressive association. There was no showing, for example, that Rotary engages in any civic or charitable service or activity that women could not perform as well, or that women would find less congenial, or that is in any way gender connected. Roberts v. U.S. Jaycees, supra, 468 U.S. at 627. See Hishon v. King & Spalding 467 U.S. 69, 81 (1984) (Powell, J. concurring).

Unlike the Jaycees, Rotary International's service objectives are



not limited to "promot[ing] the views of young men." 468 U.S. at 627. Rather its commendable goals of "encouraging and fostering the ideal of service... achievement of high ethical standards in business and professions.....as well as the advancement of international understanding, good will and peace through a world fellowship of business men united in the idea of service" (J.A. 35) are all universal in nature. None of them are gender specific; all of them can be achieved by both sexes working together.

Rotary urges as one of its arguments that "as a male only organization Rotary has been able to operate effectively over a world-wide base of varied cultures and social mores" (Appellants brief, p. 10). The deposition testimony of Rotary





International's General Secretary is far too general and nebulous to support any such conclusion as a material factor in invalidating state anti-discrimination legislation. In a world that has seen Margaret Thatcher, Indira Gandhi, Gro Harlem Brundtand, Corazon Aquino, Golda Meir, Simone Vail Sirimavo Bandaraiké and Benazir Bhutto among many others, "operate effectively" on the international scene, Mr. Pigman's testimony represents a perception as outmoded and antediluvian as Rotary's own policy.<sup>6</sup> Nothing better illustrates this than the pathetic effort of General Secretary Pigman to describe the

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<sup>6</sup> In any event, the Unruh Act does not outlaw sex discrimination in that dwindling number of countries where the social mores do not allow the mixing of men and women, or where the laws permit such discrimination.



allegedly adverse effects of admitting women on Rotary activities.

(J.S. App. G-53). His attempted explanation reduces itself to the oft-discredited belief that male members will lose their "ease of communication" and suffer a deprivation of some undefined "chemistry" attributable to an all-male organization. Any such "loss" is far too attenuated to merit constitutional protection.

Rotary does not claim that admission of women members would affect the content of Rotary's expression by shifting Rotarian "service" into activities with a greater impact on women. The reason is plain; the record not only fails to



support any such argument<sup>7</sup> it demonstrates the contrary. None of the service activities in which the Duarte club engaged prior to its admission of women was particularly male oriented; and there is no evidence that after their admission the women sought to change the nature or emphasis of these programs.<sup>8</sup>

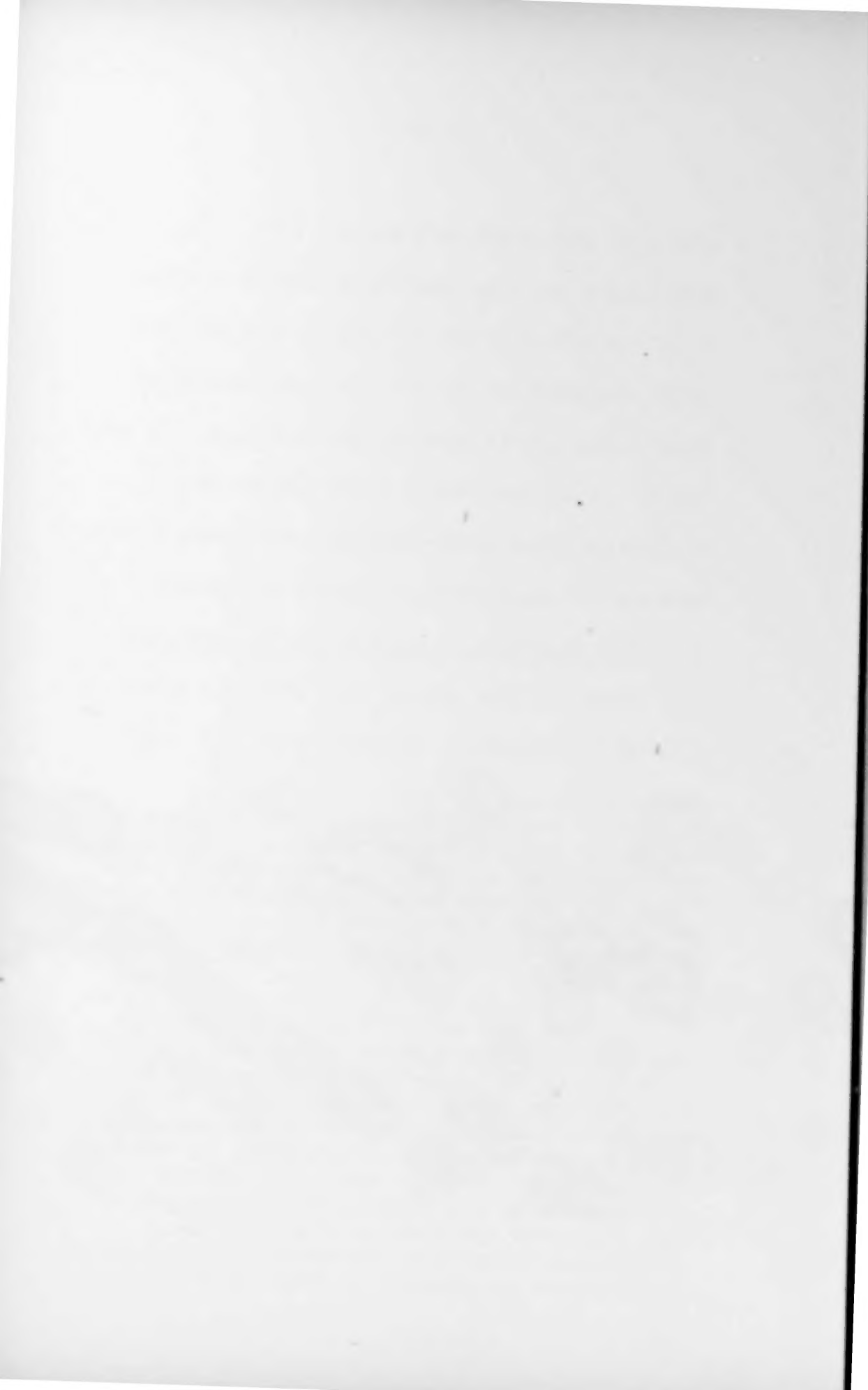
3. The State's Interest Is Compelling

Even if the Unruh Act effects some minimal intrusion on the Rotary's right

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<sup>7</sup> Under these circumstances, any such claim by Rotary would have to rely on the "unsupported generalizations about the relative interests and perspectives of men and women" which this Court rejected in Roberts v. U.S. Jaycees, supra, 468 U.S. at 628.

<sup>8</sup> All of the activities set forth in the Duarte Rotary club plans and objectives for the years 1970-1973 as reported to Rotary International involved activities equally valuable to women and from whose benefits women were in no way disqualified. They included providing assistance and occupational information for students at Duarte High School, providing volunteer workers for community recreation programs, providing a student



of expressive association, it is clear that, as in Roberts, the state's compelling interests justify that intrusion and the intrusion is limited to that necessary to achieve these interests.

The Unruh Civil Rights Act (Cal. Civ. Code §51), like the Minnesota Human Rights Act at issue in Roberts, does not have as its purpose the suppression of speech, nor does it distinguish between prohibited and permitted activity on the basis of viewpoint. (C-37). See

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safety program assembly, making available three professional people to assist and take part in the high school's career night program; attempting to start "a service club for young men and women of secondary school age"; organizing an overnight outing for underprivileged children at a mountain camp site and providing a scholarship for deserving Duarte High School students. (J.S. App G-28-30). These activities are typical of the range of activities engaged in by all Rotary clubs (J.S. App. G-32).





Broadrick v. Oklahoma, 413 U.S. 601, 616 (1973); Grayned v. City of Rockford, 408 U.S. 104 (1972). Neither is there any evidence that the Unruh Act was enforced against Rotary "for the purpose of hampering the organization's ability to express its views," Roberts v. Jaycees, supra, 468 U.S. 623-624.

As was also the case with the Minnesota statute in Roberts v. U.S. Jaycees, supra, the California Court of Appeal found that the Unruh Act serves a compelling state purpose of the highest order; in fact, the identical interest specified in Roberts v. U.S. Jaycees: "the eradication of discrimination on the basis of sex by 'business establishments' in the furnishing of 'accommodations, advantages, facilities, privileges or services.'" (J.S. App. C-37, C-10).



In this case, as in Roberts V. U.S. Jaycees, the state court found that commercial advantages and business benefits flowed from membership in Rotary. (J.S. App. C-22-23). Indeed, because of the membership "classification principle" utilized by Rotary, the commercial advantages and benefits in joining Rotary are far more substantial than those to be had from joining Jaycees. Rotary membership is limited to a cross section of business and professional men - only one or two from each business or professional classification.

The individual Rotarian not only gains business access to this diverse group of businessmen, each of whom is an acknowledged "leader" in his field, but he obtains the community recognition and



prestige which results from Rotary's selection of him as such a "leader". Clubs are urged to maximize the business benefits derived from membership by setting up "committees to be comprised of several members, each representing a different major classification for the purpose of giving confidential business advice and assistance to Rotarians who may request such help" and to hold "clinics" and "forums" to discuss economic problems (J.A. 40).

Rotary thus institutionalizes the "old boy" network and makes available to its members not only preferred access to business leaders in the community but advice and guidance from these successful business men for which "consultations" non-Rotarians would have to pay handsomely.





Membership also entitles the Rotarian to attend more formally organized "business relations conferences" where he learns management and labor relations techniques, business expertise for small businessmen and other subjects that help him improve his business and professional skills, often from non-Rotarian experts (J.A. 14, 15, 28, 29). A subscription to the Rotarian, a publication replete with tax and other business advice for executives and professionals, is also mandatory for all Rotarians (J.A. 57).

Both Rotary members and the Internal Revenue Service recognize the significant commercial benefits to be derived from club membership. Rotarians deduct club dues from their income tax as business expenses, and the Internal Revenue



Service allows such deductions. (J.S. App. C-25). Further, the club dues of some Rotary members are paid by their employers directly and deducted as business expenses of the firms.

(J.S. App. C-25-26).<sup>9</sup>

C. "Selectivity" In Membership Alone Does Not Dictate Immunity From Regulation

Rotary tries to blunt the force of

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<sup>9</sup> In order to deduct such dues, taxpayers must claim that they are "ordinary and necessary" in carrying on of one's trade or business, I.R.C. §162. Dues or fees paid for membership in such organizations as Kiwanis, Lions Club, Rotary, as well as professional associations such as bar associations and medical associations, are distinguished for purposes of deductibility from dues paid to social, athletic or sporting clubs. The latter are treated as an expenditure for an entertainment facility for which a deduction is permitted [for dues] only if the taxpayer uses the club more than 50 percent for business purposes, whereas no such 50 percent rule is imposed on use of facilities of service clubs or professional associations. See I.R.C. §274; Sen. Rep.



obvious similarities between itself and the Jaycees by seizing upon the reference to the Kiwanis organization in this Court's Roberts v. U.S. Jaycees decision. Roberts v. United States Jaycees, supra, 468 U.S. at 630. Specifically, Rotary urges that the mention of Kiwanis as having "a formal procedure for choosing members on the basis of specific and selective criteria," 468 U.S. at 630, was intended to suggest that this type of membership "selectivity" entitles an organization to immunity from state regulation of its discriminatory membership policies.

Rotary's reliance on the Kiwanis reference is misplaced for it was not

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No. 1881, 87th Cong. 2d Sess. 33 (1962);  
Rev. Rul. 63-144-1963-2 C.B. 129, Q & A  
56.



material to this Court's analysis of either intimate or expressive associational freedom. In responding to Jaycees "void for vagueness" argument, this Court noted the Minnesota Supreme Court's Kiwanis dictum as bearing on its construction of the Minnesota Human Rights Act. Yet even the Minnesota Supreme Court did not hold that Kiwanis' greater selectivity placed it outside that Act. It merely rejected the factual suggestion that the Jaycees was as selective as Kiwanis. And this Court said no more than that the reference to Kiwanis gave the Human Rights Act more rather than less specificity. 468 U.S. at 630.

The mere fact of selectivity, without analysis of what the selective membership criteria are and how they bear both on





the purposes of the state statute and First Amendment associational protections does not exclude an organization from the reach of the Unruh Act.<sup>10</sup>

A similar analysis is required before expressive associational First Amendment protections may successfully be invoked. Obviously, selectivity or exclusivity in membership will in some instances be integral to an organization's right to associational freedom. Selectivity in membership, when coupled with such factors as small size, secluded and private operation and membership control can indicate the existence of an intimate

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<sup>10</sup> Cf. Kiwanis International v. Ridgewood Kiwanis, \_\_\_ F.2d \_\_\_ (3rd Cir. 1986) (Club of 28 members which did not unselectively invite public membership held not a "place of public accommodation" under New Jersey public accommodation law).



association. As we have shown, supra, Rotary, which conducts its manifold activities in full public view, which boasts a huge membership, substantial budget, extensive staff and control apparatus, a membership attendance policy that encourages attendance at clubs other than the member's home club, and a "classification" principle that by requiring representation in the club by at least one leader of every classification of business and profession operating in the community limits membership choice, does not fit under the intimate association rubric.

However, even in large "public" organizations which aggressively seek members and whose members may derive some incidental business advantage from associations made there, membership



selectivity in the sense that particular groups are excluded from membership, may nevertheless entitle an organization to constitutional protection as an expressive association, when the selectivity substantially furthers activities which preserve and advance bona fide ideological, religious, cultural or ethnic values and practices.

In the case of such organizations, there is a clear nexus between the membership restrictions and First Amendment concerns. Government efforts to enlarge or change membership requirements in those situations would significantly intrude upon the association's protected expression. That particular expression is shaped by, and is often the product of membership selectivity, which, in turn, is dictated





by the organization's valid ideological and philosophic purposes.

As an example, we cite that association with which we are most familiar, the American Jewish Congress. The AJCongress is an organization largely devoted to taking advocacy positions on public issues. Our membership is limited to persons of the Jewish faith, who subscribe to its purposes and agree to abide by its Constitution. Those purposes include "a commitment to the unity and creative survival of the Jewish people throughout the world."

The positions American Jewish Congress expresses in legislative testimony, court briefs and convention resolutions are related to and formed by a distinctive heritage and screened



through a unique religious and cultural prism. <sup>11</sup>

For example, centuries of persecution and in more recent years, discrimination, during which Jews were subject to quotas limiting their access to professional, business and academic facilities have given them a unique sensitivity and perspective on the issue of academic and employment quotas and resulted in their filing a significant number of briefs in this Court on the subject. As a minority religion and the victim of pogroms and inquisitions, Jews also have had a very special view on the issues of free exercise of religion and separation of church and state. Here, too, the American Jewish Congress has

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<sup>11</sup> See Justice Frankfurter dissenting in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 646 (1943).



expressed a distinctive point of view to this and other Courts. For a state to force an organization such as this to admit non-Jews who do not share this very special history would clearly work very real limitations on its First Amendment freedoms. <sup>12</sup>

Rotary International is simply not such an organization. Whatever

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<sup>12</sup> Other organizations in which membership "selectivity" is relevant to the exercise of First Amendment freedoms and which should for that reason be shielded from state regulation of membership policies designed to assure equality of access to quasi-public facilities include organizations of Blacks and women seeking to advance the special concerns of these historically disadvantaged groups, nationality groups seeking to preserve bona fide historical and ethnic traditions and values and even all male groups whose goals and purposes address uniquely male needs and concerns. Among the latter groups would be groups of fathers seeking reform of child custody laws, or husbands of laws on alimony, or of males associating to



membership selectivity it exercises, be it the restriction to men or to business and professional leaders, has had no valid relationship to, or impact upon, the organization's very limited forays into protected speech. See p.18, supra. In fact, that very selectivity, in the

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oppose affirmative action for women. The amicus brief filed by the Boy Scouts of America argues issues that are simply not raised by this case. As noted in that brief, (p.5), the Boy Scouts case now pending in the lower California courts presents, as the main question, whether the state can require admission of persons who espouse beliefs or goals contrary to those officially adopted by the organization, in that case the moral belief opposing homosexuality. That issue does not arise here, and a decision in favor of Appellees here will not foreclose Boy Scouts from pursuing their contentions in their own case. It is unnecessary to further note that under this Court's decision in Bowers v. Hardwick, 106 S.Ct. 2841 (1986), homosexuality is not on a par with race, religion or gender, either in terms of constitutional protection or susceptibility to state regulatory power.





form of the classification principle, both in origin and present effect, merely emphasizes the commercial and business benefits derived from the organization. It is the denial of these important benefits to women <sup>13</sup> with all the disadvantages and stigma that such denial entails, which, weighed in the light of the minimal impact on Rotary's protected speech, makes Rotary a fit subject for state regulation despite, or even because of, its alleged "selectivity". Railway

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<sup>13</sup> We need not repeat here the extensive evidence submitted to and relied on by the Court in Roberts v. U.S. Jaycees, supra, with respect to the "importance of removing the barriers to economic advancement and political and social integration that have historically plagued...women. 468 U.S. at 626." Nor is it necessary at this late date to dwell on the "serious social and personal harms" laws prohibiting gender discrimination in "various forms of public, quasi-commercial conduct" were designed to eliminate. Id at 625.



Mail Association v. Corsi, 326 U.S. 88, 94 (1945); See also Garcia v. Texas State Board of Medical Examiners, 421 U.S. 995 (1975), aff'g mem., 489 F.Supp. 434 (W.D. Tex. 1974) (state prohibition on practice of medicine by association of laymen); Waugh v. Mississippi University, 237 U.S. 589 (1915) (state interest in assuring appropriate educational atmosphere at public university justifies limitation on student membership in fraternities).

The California Court of Appeals noted that commercial and business advantage was the original impetus for creation of Rotary:

"The earliest meetings of the Rotarians...were designed to produce business for each member (Rotary Basic Library, Focus on Rotary, Vol. 1, p.2). The men who joined were "motivated primarily by the business they expected to



receive from other club members...(Rotary Basic Library, Vocational Service, Vol. 3, pp.6-7...).

The trial court found that the classification principle of selecting one representative from each business and profession "originated many years ago from self-seeking commercial purposes." (J.S.App. C-23-24).

Membership is still based on the classification system and those commercial purposes and benefits still obtain. Despite present disclaimers "that the Rotary has for many years abandoned the use of the classification system as a device to encourage preferential business relations among Rotarians" (J.S. App.B.4), the written Rotary policy on "Commercializing Rotarians" expresses a candid recognition





that these commercial advantages and benefits remain to this day.<sup>14</sup>

Moreover, as we have shown, supra p.29, this very classification principle, the "selectivity" which Rotary claims distinguishes it from Jaycees, contributes to the commercial benefit enjoyed by Rotary members, because it involves not only contact with a diverse group of business and professional leaders but public recognition of the Rotary member as a "leader" in his own field.

This kind of commercial benefit clearly does not accrue from the more indiscriminate membership policies of organizations like Jaycees. It is a form

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<sup>14</sup> "If new or increased business comes naturally to a Rotarian as a result of friendships which he has made in Rotary, that is a normal development which takes place outside Rotary as well as inside, and is not in any way an infringement of the ethics of Rotary membership." Exhibit A. 1971 Manual of Procedure page 38 (J.S. App. G-36).



of selectivity, however, that is essentially gender neutral. Nothing in the classification requirement militates against the admission of women. Women today are represented in all the diverse classifications of businesses and professions. See U.S. Department of Labor, Bureau of Labor Statistics, Employment and Earnings p.29 (Nov. 1986). Many are recognized leaders in these fields in communities across the country. Indeed, the Duarte chapter opened its membership to women for precisely that reason. And women have an illustrious history of service to their communities.

Conversely, application of the Unruh Act to Rotary International and its local clubs would not, as a matter of constitutional law, require admission of any woman who is not a business or



professional leader in an "open" classification or who does not meet the club's standards of character, business, social standing and general eligibility. Cf. Democratic Party v. Wisconsin 450 U.S. 1071 at 122, (1981); Cousins v. Wigoda, 419 U.S. 477 (1975); L. Tribe American Constitutional Law, 791 (1978).

The Unruh Act as applied in this case requires only the elimination of "arbitrary" forms of discrimination, not that type of selectivity which is consistent with, and designed to further, bona fide organizational purposes. It requires only that Rotary cease denying membership to women. For the same reasons that prompted this Court's decision in Roberts v. U.S. Jaycees, supra, the very limited impact on Rotary's expressive association is



heavily outweighed by the state's interest in ending an invidious discrimination which does not further any of Rotary's legitimate objectives.

CONCLUSION

Accordingly, the judgment of the California Court of Appeals should be affirmed.

Respectfully submitted,



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January 1987



JAN 28 1987

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

JOSEPH P. SPANIOLO, JR.  
CLERK

BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

—v.—

*Appellants,*

ROTARY CLUB OF DUARTE, et al.,

*Appellees.*

ON APPEAL FROM THE  
COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT

**BRIEF OF THE ROTARY CLUB OF SEATTLE —  
INTERNATIONAL DISTRICT, ROTARY CLUB OF  
BOSTON, SITKA ROTARY CLUB, ROTARY  
CLUB OF SAN FRANCISCO, AND  
“AWARE: ACCEPT WOMEN AS ROTARY EQUALS”  
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1986

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BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

Appellants,

v.

ROTARY CLUB OF DUARTE, et al.,

Appellees.

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On appeal from the  
Court of Appeal of the State of California  
Second Appellate District

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BRIEF OF THE ROTARY CLUB OF SEATTLE  
INTERNATIONAL DISTRICT, ROTARY CLUB OF  
BOSTON, SITKA ROTARY CLUB, ROTARY  
CLUB OF SAN FRANCISCO, AND  
"AWARE: ACCEPT WOMEN AS ROTARY EQUALS"  
AS AMICI CURIAE IN SUPPORT OF APPELLEES

---

This brief is submitted by the Rotary  
Club of Seattle-International District and  
other Rotary organizations described below  
as amici curiae in support of appellees  
Rotary Club of Duarte and its individual  
members. Written consent of the parties

pursuant to Supreme Court Rule 36.2 has been obtained and will be filed with the Clerk of the Court along with this brief.

INTERESTS OF AMICI CURIAE

Amici Rotary Club of Seattle-International District (the "Seattle Club"), Rotary Club of Boston, Sitka Rotary Club, Rotary Club of San Francisco and a worldwide association of Rotary members known as "AWARE: Accept Women As Rotary Equals" are active members and participants in the Rotary organization. As such, they have a vital interest in assuring that this Court does not condone the exclusion of women as members of Rotary. These amici and many other Rotary members, though they continue to believe in Rotary's other commendable goals and aspirations, wish to end Rotary's outdated discriminatory membership practices. Given the increasing role of women in business and the professions, these amici

believe that inclusion of women is important to the continued vitality of Rotary as an organization.

1. Rotary Club of Seattle - International District.

The Seattle Club recently admitted several women as members. Subsequently, the Seattle Club, along with three of its male members and three of the new female members, brought suit against Rotary International on the grounds that Rotary International's arbitrary and discriminatory membership policy which excludes women violates the Washington Law Against Discrimination, Chapter 49.60 RCW, and other related statutes. This case is now pending in the United States District Court for the Western District of Washington at Seattle.<sup>1</sup>

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<sup>1</sup>Rotary Club of Seattle-International District v. Rotary International, No. C86-1475M (W.D. Wash. filed Sept. 15, 1986).

The Washington Law Against Discrimination, which includes an equal access to public accommodations provision, is similar in intent and scope to the Unruh Civil Rights Act, California Civil Code § 51. The Washington State Human Rights Commission and the Washington Attorney General's Office filed an amicus brief in the Seattle Club's case expressly taking the position that the Washington public accommodations statute applies to prohibit discriminatory membership requirements in organizations such as Rotary.

The record in the Seattle litigation demonstrates that the membership selection process actually used by Rotary clubs is not highly selective and varies considerably from the "official policy" expressed by Rotary International. In addition, the

record clearly establishes tangible business benefits accruing to individuals who are members of Rotary.<sup>2</sup>

2. Rotary Club of Boston.

The Rotary Club of Boston is losing members, potential speakers, and prestige because it is prohibited from admitting women by Rotary International. Ten years ago, the Boston Club had 250 members. Today it has 180 members, and President Kerck Kelsey attributes the drop in membership, at least in part, to Rotary International's discriminatory policy. Several speakers have ceased accepting speaking engagements with the Boston Club in protest of women's exclusion from Rotary. Like other Rotary clubs across

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<sup>2</sup>The Seattle litigation was filed only four months ago, in September 1986. Discovery in that case can be expected to reveal a substantial amount of additional factual information indicating that Rotary is not "private" in a constitutional sense.



the country, the Boston Club has also lost the support of corporations such as NewWorld Bank and John Hancock Mutual Life Insurance Co., who have refused to pay their employees' Rotary dues until Rotary clubs stop discriminating against women.

The Boston Club believes Rotary International's discriminatory policy is in violation of Massachusetts antidiscrimination laws. Massachusetts Public Accommodations Law, Mass. Gen. L. ch. 272, § 98, prohibits discrimination in "any place of public accommodation, resort or amusement." Under the applicable Massachusetts Supreme Judicial Court ruling,<sup>3</sup> Rotary must abide by the statute because it meets in a place of public accommodation.

Rotary International is also in violation of the Massachusetts Civil Rights

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<sup>3</sup>United States Jaycees v. Massachusetts Commission Against Discrimination, 391 Mass. 594 (1984).

Act, Mass. Gen. L. ch. 12, § 11H, which prohibits any person from interfering or attempting to interfere with another's exercise or enjoyment of rights secured by the Constitution or laws of the United States or of Massachusetts. Rotary International is interfering with women's rights under the Massachusetts Equal Rights Amendment by barring women from Rotary.

3. Sitka Rotary Club.

Sitka Rotary Club, located in Sitka, Alaska, has over 40 members. The Sitka Club is among those clubs actively seeking to change the Rotary International constitution and by-laws to permit Rotary clubs to admit women as members. The Sitka Club sponsored a successful resolution at the most recent Rotary District 503 convention which urged that individual Rotary clubs be permitted to decide whether to admit women as members. (App. K.) The Sitka

Club recently passed a resolution supporting all legal challenges aimed at admitting women as members. (App. L.)

4. Rotary Club of San Francisco.

Although the Rotary Club of San Francisco is the second oldest Rotary club in the world, it is in the forefront in accepting women as members of Rotary. The San Francisco Club has a vital interest in seeing the California public accommodations law upheld in this Court, so that it can continue to admit women as members and keep the excellent women members already admitted to the club. The San Francisco Club has 560 members, including seven newly admitted women members. Among these new members is San Francisco's mayor, Dianne Feinstein. Many more women are in the process of being admitted to the San Francisco Club at the present time.

If the California law is upheld, the San Francisco Club will also be able to

retain corporate support and regain the corporate support lost in the last few years when, because of Rotary International's discriminatory policy against women, corporations such as IBM, Levi Strauss and Bank of America refused to pay their employees' Rotary dues.

5. AWARE.

"AWARE: Accept Women As Rotary Equals" is an informal alliance of Rotarians from throughout the world whose declared purpose is to work within Rotary to permit the admission of women as regular members of Rotary clubs. AWARE currently has a mailing list of over 300 individual Rotarians and Rotary clubs who each periodically receive AWARE's newsletter discussing recent events affecting the goal of admitting women as full members of Rotary clubs.

### SUMMARY OF ARGUMENT

This Court's recent discussion of freedom of "intimate association" and of "expressive association" in Roberts v. United States Jaycees, 468 U.S. 609 (1984), provides the framework for analysis of Rotary International's contention that the California Unruh Civil Rights Act impermissibly impinges on its rights to freedom of association.<sup>4</sup> The question of whether the Unruh Act applies to Rotary

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<sup>4</sup>In the course of this appeal, Rotary International also challenges the Unruh Act on the grounds of vagueness and overbreadth. These amici do not comment on this issue because this argument was neither considered nor passed on by the state court below, and thus should not be considered by this Court.

The "not pressed or passed upon in the courts below" rule requires this Court to forego consideration of entirely new questions which were not both raised and decided by the courts below. Illinois v. Gates, 462 U.S. 213, 218 (1983) (quoting McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940)). Moreover, in ruling on the Unruh Act, these amici urge this Court to consider that a very limited record was placed before the trial court and that numerous other states have similar legislation which will be impacted by any broad ruling.

is an issue of state law on which the determination of the California courts is final.<sup>5</sup> The only issue for this Court is whether California's prohibition against gender discrimination, as applied in this case, violates the federal Constitution.

In Roberts, this Court upheld application of a similar Minnesota statute against the Jaycees, holding that states' compelling interest in eradicating discrimination against women justified legislation requiring organizations not characterized by intimate personal relationship to admit women as members. Like the Jaycees, Rotary is not an "intimate" group and the expressive activities of its

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<sup>5</sup>Similarly, other states must remain free to determine whether their comparable statutes apply to organizations such as Rotary.



male members would not be impaired by admission of women members.'

Legislative enactments prohibiting gender discrimination are valid as long as they are content-neutral and are no more restrictive than necessary to accomplish their antidiscriminatory purpose. The few restrictions necessary to protect individual freedoms under the First Amendment must be narrowly limited and are not applicable here. Because of its size and public persona, among other things, Rotary does not involve the "highly personal" family-like relationships entitled to the constitutional protection of intimate

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'Rotary International now argues that "[t]he differences between Rotary and the Jaycees . . . are significant and controlling." (Appellants' Br. at 29.) In its amicus submission to this Court in Roberts, however, Rotary International repeatedly referred to Rotary and Jaycees together and insisted that both were "private clubs." See, e.g., Amicus Curiae Brief of Rotary International at 13, Roberts v. United States Jaycees, No. 83-724 (U.S. filed Mar. 26, 1984).



association. To the extent that Rotary membership implicates expressive activities protected by the First Amendment, any incidental impact on rights of expressive association is outweighed by the recognized compelling state interests in eliminating gender discrimination. Any organization such as Rotary which provides significant business advantages to its members should be considered commercial, and therefore subject to rational state regulation to accomplish equality of advantage for all citizens, regardless of the organization's "official" statements of a noncommercial purpose.

#### ARGUMENT

- I. This Court Has Previously Determined That States Have a Compelling Interest in Eliminating Discrimination Against Women.

It is firmly established that society has a compelling interest in "eradicating

discrimination against its female citizens," and may act to do so by "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." Roberts, 468 U.S. at 623, 626. Arbitrary exclusion from jobs, schools, businessmen's clubs and other avenues of achieving success in the business world are among those barriers which the state may legitimately proscribe, as California has done in the Unruh Civil Rights Act at issue here.

Antidiscrimination statutes have historically served the important purpose of providing a mechanism enforcing rights to equal access and opportunity. One form of antidiscrimination law is the public accommodations statute, which began as a statute prohibiting discrimination in public accommodations, but has become in many

states a prohibition against discrimination by any establishment which offers goods and services of any kind to the public. See Discrimination and Access to Public Places: A Survey of State and Federal Accommodations Laws, 7 N.Y.U. Rev. L. & Soc. Change 215, 218 (1978). After the Court overturned the early federal public accommodations law in 1883, for many years states were the only forum for challenging discriminatory practices in public accommodations. Roberts, 468 U.S. at 624. The great majority of states have appropriately responded with their own public accommodations laws to counter discrimination.<sup>7</sup>

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<sup>7</sup>See Discrimination and Access to Public Places: A Survey of State and Federal Accommodations Laws, 7 N.Y.U. Rev. L. & Soc. Change 215, 242-43 (1978) for a listing of the 38 states, plus the District of Columbia, which have public accommodations statutes.

As awareness of discrimination has increased, the coverage of such statutes has broadened. In recent years, the majority of states have recognized that sex discrimination is pervasive and debilitating (see App. I-3 to I-8)<sup>8</sup> and have included sex among the classifications protected from discrimination. Washington is no exception. In their amicus curiae brief in Rotary Club of Seattle-International District v. Rotary International,<sup>9</sup> Washington State Human

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<sup>8</sup>The appendix to this amicus brief is cited simply as "App." These amici have adopted the form used in Appellants' Brief, citing the Joint Appendix as "Jt. App." and the Appellants' Appendix filed with the Jurisdictional Statement as "J.S. App."

<sup>9</sup>As discussed in the statement of interests, the Rotary Club of Seattle-International District has filed suit against Rotary International under the Washington Law Against Discrimination, Chapter 49.60 RCW, to enjoin enforcement against the Seattle Club of Rotary's discriminatory membership policy. Rotary Club of Seattle-International District v. Rotary International, No. C86-1475M (W.D. Wash. filed Sept. 15, 1986).

Rights Commission and Washington Attorney

General stated:

In 1973 the [Washington] legislature amended the state law against discrimination to include the right to be free from gender based discrimination in employment, places of public accommodation, real estate, credit and insurance transactions. . . . It is apparent that the state legislature found gender based discrimination to be a serious detriment to the general well-being of the people of this state. It is also apparent that a public policy was adopted prohibiting gender based discrimination over a broad range of commercial and economic activity.

(App. I-9 to I-10.)

The Washington State Human Rights Commission and Attorney General concluded that Rotary clearly comes within Washington's public accommodations statute and therefore

must abide by its antidiscrimination provisions. Their brief aptly assesses the outdated and inconsistent position of Rotary International:

It is both deplorable and ironic that a world-wide organization which was founded in [the] United States over 80 years ago to provide an opportunity for leaders in the business and professional communities to work together for community betterment, as well as their own personal gain, has not seen fit to recognize their own potential importance in opening up opportunities for full participation of women in the economic life of the communities they seek to serve.

(App. I-21 to I-22.)

In Roberts, this Court strongly supported the interest of Minnesota in barring gender discrimination in public accommodations, citing the grave social and personal harms, deprivation of dignity, and loss to society such discrimination can cause. Roberts, 468 U.S. at 625. These amici strongly urge this Court to validate the efforts of other states,



including California, Washington, Massachusetts and others, to eliminate gender discrimination by rejecting Rotary International's claim of constitutional immunity for its practice of discriminating against women.<sup>10</sup>

II. Rotary Membership Is Not "Distinctively Personal" and Therefore Does Not Enjoy Constitutional Protection of Intimate Association.

This Court has afforded constitutional sanctuary of "intimate association" only to "the formation and preservation of

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<sup>10</sup>In case after case throughout the United States, prohibitions against admission of female members in service clubs such as Rotary have been struck down as violating state public accommodations statutes similar to the California statute at issue here. See, e.g., Rogers v. International Association of Lions Clubs, 363 F. Supp. 1476 (E.D. Mich. 1986) (preliminary injunction granted); Kiwanis International v. Ridgewood Kiwanis Club, 627 F. Supp. 1381 (D.N.J. 1986), rev'd, \_\_\_ F.2d \_\_\_, 1 U.S.P.Q.2d 1062 (3d Cir. 1986); United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981); United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1983); Lloyd Lions Club of Portland v. International Association of Lions Clubs, 81 Ore. App. 151, 724 P.2d 887 (Ore. App. 1986).



certain kinds of highly personal relationships." Roberts, 468 U.S. at 618. The family relationships which have given rise to such rights<sup>11</sup> reflect not only the origins of the intimate association concept but also its limitations. See Roberts, 468 U.S. at 619. Most recently, in fact, this Court narrowly limited the scope of rights of intimate association, refusing to extend it even to all sexual practices between consenting adults. See Bowers v. Hardwick, 106 S. Ct. 2841, 2844 (1986). In contrast to the cases in

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<sup>11</sup>See, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Quilloin v. Walcott, 434 U.S. 246 (1978) (due process for family associations); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (rights of extended family to reside together); Carey v. Population Services International, 431 U.S. 678 (1977) (access to contraceptives); Wisconsin v. Yoder, 406 U.S. 205 (1973) (education of children); Roe v. Wade, 410 U.S. 113 (1973) (termination of pregnancy); Stanley v. Illinois, 405 U.S. 645 (1972) (paternal rights of unwed fathers); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (education of children).

which rights of intimate association have been recognized, Rotary does not involve marriage, family or procreation.

Consideration of the factors outlined in Roberts demonstrates that Rotary, like Jaycees, falls clearly outside the category of relationships "worthy of this kind of constitutional protection," Roberts, 468 U.S. at 620. Distinctive characteristics of relationships which qualify for constitutional rights of intimate association include relative smallness, a high degree of selectivity, seclusion from others, and a wholly noncommercial purpose. See Roberts, 468 U.S. at 620. Absence of any of these attributes would disqualify an organization as an intimate association in the constitutional sense. Rotary's claim fails on all of these criteria.

A. Size.

With over one million members, Rotary International can hardly be characterized as a "relatively small" organization. Nor are individual Rotary clubs necessarily small. Rotary International's reference to the "average" size of Rotary clubs (Appellants' Br. at 7, 21) is extremely misleading. The Seattle No. 4 Rotary Club has over 750 members (App. D-1) and the San Francisco Rotary Club has 560 members. Many clubs in other cities similarly have memberships numbering in the hundreds.

In Roberts, this Court found that Jaycees clubs of approximately 400 members were "large" groups not entitled to constitutional protection for their policy of excluding women members. 468 U.S. at 621. Likewise, Rotary clubs of 750 or 560 members, or even 50 members for that matter, do not warrant the First Amendment

rights of intimate association which may attach to small family groups.<sup>12</sup>

B. Nonselectivity.

A second attribute distinguishing intimate relationships is "a high degree of selectivity in decisions to begin and maintain the affiliation." Roberts, 468 U.S. at 620. As "evidence" of its asserted selectivity, Rotary International relies on the admission procedures contained in its recommended<sup>13</sup> local club by-laws. (Appellants' Br. at 7-9.) Although this procedure and "classification" system may, on paper, give an

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<sup>12</sup>"Whatever the precise scope of the rights recognized in such cases [involving privacy rights of association], they do not encompass associational rights of a 295,000-member [or, as in this case, a one million-member] organization whose activities are not 'private' in any meaningful sense of that term." Roberts, 468 U.S. at 631 (O'Connor, J., concurring).

<sup>13</sup>These procedures are only "recommended" for "consideration" by local Rotary clubs. "There is no uniform set of rules that must be adopted by clubs." (Jt. App. 88.)

appearance of selectivity, the reality of how Rotary actually operates is far different. In practice, there is active solicitation of members, little or no selectivity and no significant barrier posed by any of the purported systems or procedures.

Rotary policy is to find (or create) a classification to fit each and every potential new member. (App. A-1 to A-2; E-5; F-1 to F-2.) In fact, Rotary club presidents-elect are exhorted to "make the classification fit the man. Don't lose a potentially good member . . . . [F]ind a classification that will cover his line of endeavor." (App. E-6.) In the experience of three Rotary club presidents whose testimony is in the record in the Seattle litigation, no prospective member is ever turned down for lack of an available classification. (App. A-1; E-5; F-2.) Moreover, selection of members is controlled

entirely by the local Rotary clubs. Apart from the exclusion of women, neither Rotary International nor any of the other approximately 22,000 local Rotary clubs have any voice in the selection of new members by a local club such as Duarte or the Seattle Club. Rotary International's brief misleads this Court by presenting the "recommended" by-laws as "fact" and failing to mention that the membership selection processes actually employed by the local clubs vary considerably from the "official" Rotary International policy.

Like the Jaycees, Rotary clubs "actively recruit" and "solicit" new members. (App. A-1 to A-2; E-5; F-1.) The only real screening criteria actually applied are that the prospective member be engaged in a business or profession, of "good reputation" and male, surely evidence of "attenuated" rather than intimate



association.<sup>14</sup> (App. E-5.) While Rotary's membership procedure "has the appearance of being elaborate, formal, and structured, in reality, it is not selective." Cf. Rogers v. International Association of Lions Clubs, 636 F. Supp. 1476, 1480 (E.D. Mich. 1986). Local Rotary clubs, like Jaycees, are "large and basically unselective groups," cf. Roberts, 468 U.S. at 621, eager to expand their membership.

C. Lack of Seclusion.

A third factor identified in Roberts is the degree of "seclusion from others in critical aspects of the relationship." 468 U.S. at 620. Rotary clubs, which perpetuate and emphasize their role in the public arena, do not operate in privacy or

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<sup>14</sup>Rotary International's official policy is "to produce an inclusive, not exclusive, membership." (J.S. App. C-2.) The turnover in Rotary clubs averages from 10 to 20% a year. (J.S. App. C-28; App. E-3.)



seclusion. Through open meetings, broad exchanges with other clubs, sponsorship of public debates and participation of non-members, Rotary clubs and their members are anything but private.

By official policy and actual practice, Rotary club meetings and activities are open not only to members of all other Rotary clubs, but also to nonmembers and to the public in general. Indeed, women already participate in Rotary activities both as guests and frequently as speakers and honorees. It is only with respect to voting membership and eligibility to hold office that Rotary clings to its policy of discrimination.

Rotary members are welcome, and have a right, to attend any of over 22,000 Rotary clubs worldwide. (App. E-1; J.S. App. C-36.) For instance, in the Seattle area alone there are over 30 Rotary clubs. (App. D-1 to D-2.) Instead of

local clubs remaining secluded from each other and the outside world, Rotary members are encouraged, indeed required, to attend other clubs when they travel, in order to meet Rotary's attendance requirements.<sup>15</sup> (J.S. App. C-28.) A member of even a small Rotary club can thus be expected to associate with a large number of the more than one million Rotary members--whom he has had no voice in selecting and who, conversely, have no say in whether he is a Rotary member.

In addition to this interaction among members of different clubs, Rotary clubs do not remain secluded from the public at large. Rotary meetings are generally held

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<sup>15</sup>Attendance requirements are another area in which official Rotary policy is at odds with reality. The official recommended Rotary club by-laws require a member to attend 80% of the meetings in order to maintain Rotary membership. However, the Boston Club has publicly announced that members are only required to attend 60% of the meetings. (App. M-4.) Other clubs similarly do not adhere to the 80% attendance requirement.

at public hotels and restaurants. (App. E-7; M-3.) Likewise, Rotary clubs serve as an important public forum, sponsoring political debates and speakers on a variety of topics of community interest. Such functions are open to nonmembers and to the press. (App. C-3; D-2; E-13; F-3; H-3; M-3.) Indeed, public awards have been presented to non-Rotarian recipients at official club functions. (App. G-2.)

Other Rotary activities similarly lack the seclusive attributes of truly private associations. Women are welcome to attend Rotary meetings as guests and, in an ironic twist, are often invited to speak at Rotary functions. Rotary sponsors high school and college clubs which include women in their membership. In addition, Rotary is well known for its scholarships and international exchange opportunities which include a substantial number of girls and women. (App. E-14.) As with

the Jaycees, there is nothing "private" about Rotary clubs and "numerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another." Cf. Roberts, 468 U.S. at 621.

D. Business Purposes and Functions.

Although service may be a significant activity of Rotary clubs, the fact is that business purposes and benefits are the primary motivation for many members to participate in Rotary. While "official Rotary policy" ostensibly precludes members from obtaining business benefits from Rotary membership, policy again collides with reality. Rotary International should not be permitted to hide behind the transparent screen of officialdom.

It cannot be disputed that Rotary clubs serve as meeting grounds for business and professional men and provide a

place where business referrals and contacts are made. (App. C-2 to C-3; E-1 to E-3, E-6 to E-7; G-2 to G-5; H-1 to H-2.) This "network of business contacts . . . valuable in terms of professional development" (see App. M at 1) which Rotary membership offers is clearly an important inducement in attracting new members.

Moreover, whatever Rotary International's "policy" documents may say, most Rotary members themselves view Rotary membership as having an important business function. The majority of members' dues are either paid for by their employers or deducted as "reasonable and necessary" business expenses on the members' federal

income tax returns.<sup>16</sup> (App. C-1; D-1; E-9; H-1; J.S. App. C-25.)

The determination of whether a particular organization merits constitutional rights of intimate association "unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." See Roberts, 468 U.S. at 620. Marking one point along that spectrum, this Court's recent decision in Hishon v. King & Spalding, 467 U.S. 69 (1984), established that a private law partnership may be prohibited from

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<sup>16</sup>The federal tax code permits club dues to be deducted as business expenses only if the club membership is "used primarily for the furtherance of the taxpayer's trade or business" and is "directly related to the active conduct of such trade or business." See 26 U.S.C. § 274(a)(2)(C) (emphasis added). Deduction of Rotary club dues has been upheld as a "reasonable, ordinary and necessary" business expense. Holland v. United States, 311 F. Supp. 422, 428-30 (C.D. Cal. 1970).



discriminating against women in the selection of partners, even though such decisions are highly subjective and involve the choice of individuals with whom other partners in the firm must associate on a day-to-day basis in the practice of their profession.

If the million-member Rotary organization is compared to a private law practice, there can be no question but that Rotary involves fewer, rather than more, indicia of intimate personal relationships. Since a private law firm can be prohibited from refusing to accept women as partners in a close working relationship, certainly Rotary is not entitled to shield its discriminatory membership policy behind a claimed freedom of intimate association. Given the size of many local clubs and of the organization as a whole, the active recruitment of new dues-paying



members, the lack of individual selectivity in actual practice, the openness of Rotary meetings and activities to the public at large, including women, and the critical commercial function of the organization as an opportunity to develop business and professional contacts, Rotary, like the "large business enterprise" that it is, "seems remote from the concerns giving rise to this constitutional protection." Roberts, 468 U.S. at 620.

III. Any Incidental Infringement of Rotary International's Claimed Right of Expressive Association Is Justified by Compelling State Interests in Eliminating Discrimination Against Women.

As this Court recognized in Roberts, state legislation prohibiting gender discrimination in places of public accommodation may clash with claimed rights to freedom of expressive association. Even assuming, arguendo, that Rotary International is engaged in expressive activities

protected by First Amendment freedom of association, "[t]he right to associate for expressive purposes is not, however, absolute." Roberts, 468 U.S. at 623. The question then becomes whether the state's "compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to [Rotary] may have on the male members' associational freedoms." Id.

A. The Admission of Women as Members of Rotary Would Not Interfere With Any Constitutionally Protected Expressive Activities.

Although Rotary International asserts in a conclusory fashion that it would be harmed if required to allow the admission of women members, it has made no substantial showing, as required by Roberts, that admission of women would "impede the organization's ability to engage in [constitutionally] protected activities or to disseminate its preferred views." 468

U.S. at 627-28; see also Hishon v. King & Spalding, 467 U.S. 69, 78 (1984). In the absence of a "showing far more substantial," this Court should "decline to indulge in the sexual stereotyping" and "unsupported generalizations," Roberts, 468 U.S. at 628, that underlie Rotary International's claims.

As Justice O'Connor observed in Roberts, the Court should at the threshold examine whether Rotary's predominant activities and purposes are in fact expression entitled to protection under the First Amendment. 468 U.S. at 633, 635 (O'Connor, J., concurring). If not, then Rotary is entitled to only the minimal constitutional protections afforded to commercial association. Id. at 634; see also, e.g., Ohralik v. Ohio State Bar Association, 436 U.S. 447, 459 (1978); Railway Mail Association v. Corsi, 326 U.S. 88, 93-94 (1945). At most, Rotary's

activities fall only secondarily within the ambit of protected expression. While these clubs do engage in worthy civic and community activities, in actuality Rotary functions primarily as meeting grounds for the male business and professional community.

Even if Rotary's activities were characterized as expression, its associational freedom is still subject to reasonable regulations, narrowly drawn to serve the compelling state interest in removing barriers to the economic advancement of women. Like the Jaycees, Rotary International "has failed to demonstrate that the [Unruh] Act imposes any serious burdens on the male members' freedom of expressive association." Roberts, 468 U.S. at 626.

Nowhere in its brief does Rotary International identify any expressive purposes of the organization other than that

its members engage in "civic," "charitable" and "community service" activities. (Appellants' Br. at 16.) How any such "message" would be changed by admitting women as members of the organization is not explained. In fact, as previously discussed, women already participate in Rotary meetings and many other activities, plainly contradicting any claim that the inclusion of women would impair Rotary's collective voice.

Moreover, the record in the Seattle litigation demonstrates that many Rotarians desire to include women members in Rotary. From individual members to club presidents, district governors and even the president of Rotary International, many people within Rotary itself, including these amici, affirmatively wish to associate with women as members of the organization. These Rotarians foresee acceptance of women members as enhancing

and extending, rather than detracting from, Rotary's ability to pursue its associational goals. (App. A-2; B-1 to B-2; D-3; E-4; F-2 to F-4; J; K; L; N.)

California and Washington, as well as Massachusetts and other states, have a compelling interest in eradicating gender discrimination and providing equal access to quasi-public organizations such as Rotary. These interests outweigh any interest Rotary may have in freedom to exclude women members. Rotary's expressive rights will be affected only slightly, if at all, by giving voting membership rights to the same business and professional women who already share the group's views and already participate to a substantial degree in its activities. The only significant results will be the elimination of a remaining bastion of male privilege, and a corresponding broadening and strengthening of the membership base



to support Rotary's worthwhile service activities.

Since Rotary International's assertion that the admission of women would impair the message communicated by its collective voice or impair a symbolic message is, as in Roberts, "attenuated at best," see 468 U.S. at 627, the Court should reject Rotary's claim to constitutional protection for its continued discrimination against women. The California statute at issue here, like the Minnesota statute upheld in Roberts, "'responds precisely to the substantive problem which legitimately concerns' the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose." Roberts, 468 U.S. at 629 (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984)).



B. Because Rotary Has Business Purposes and Fulfills a Business Function for Its Individual Members, Society's Interest in Eliminating Sex Discrimination Outweighs Any Interest of Rotary International in Freedom to Not Associate With Women as Members.

Wholly apart from whether Rotary's activities qualify as First Amendment expression, and even if the messages communicated by the organization would arguably be affected by the inclusion of women members, this Court should still uphold the right of states to prohibit gender discrimination in organizations such as Rotary which offer business and commercial advantages to their members. While there may be some kinds of organizations which states should not be allowed to require to admit women members, Rotary is not such an organization.

These amici urge the Court to adopt a two-part test, based both on the purposes of the organization and on the motivations

of its members, for determining whether the societal interest in prohibiting gender discrimination outweighs claimed associational rights of any particular organization:

If (a) the organization itself has any significant business or commercial purposes or if (b) business or commercial advantages are any significant reason for members to join the organization, then the organization should be deemed to be engaged in commercial association and should not be entitled to constitutional protection for decisions to discriminate in membership on the basis of gender.<sup>17</sup>

This test allows an appropriate measure of protection for truly private groups such as purely social men's or women's clubs, or organizations like the Boy Scouts or Girl Scouts, which have no business

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<sup>17</sup>While a similar test might be appropriate in the context of discrimination on the basis of other categories such as race, religion or political views, such questions are not before the Court and can be left for subsequent consideration.

purposes or functions.<sup>18</sup> At the same time, it does not allow an organization to bar women--or men, for that matter--from access to business advantages by hiding behind a cloak of ostensible privacy.

While the result in Roberts was correct, Justice O'Connor is right that the opinion did not articulate a clear standard capable of determining whether states' interests in prohibiting discrimination take precedence over claimed associational rights in any given instance. If applied literally, the Roberts majority's focus on whether required admission of women might "change the content or impact of the organization's speech," see

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<sup>18</sup>The Court need not address issues raised by such other decisions of the California courts as Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 219 Cal. Rptr. 150, 707 P.2d 212 (1985), or Curran v. Mt. Diablo Council of the Boy Scouts, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), appeal dismissed, 468 U.S. 1205 (1984), which are not before the Court in this case.

468 U.S. at 628, would permit wholesale discrimination to remain unchecked so long as any part of the organization's activities were devoted to expression of views opposed by the group subject to discrimination. Cf. 468 U.S. at 632-33 (O'Connor, J., concurring).

Yet a test based on whether "the association's activities are not predominantly of the type protected by the First Amendment," id. at 635, leads to exactly the same problem of being simultaneously "overprotective of activities undeserving of constitutional shelter and underprotective of important First Amendment concerns."<sup>19</sup> Id. at 632. Moreover, such a

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<sup>19</sup>Discrimination by organizations with clear commercial purposes would be protected as long as other expressive activities "predominated" over the business functions, while genuinely noncommercial organizations could lose the right to determine their own membership if they were not "predominantly engaged in protected expression." Cf. Roberts, 468 U.S. at 632-33 (O'Connor, J., concurring).

test proves elusive, even circular, in application. "Determining whether an association's activity is predominantly protected expression," id. at 636, often depends in the final analysis on whether the organization's membership decisions are deemed to be protected. As even Justice O'Connor concedes, the line drawn is "fluid and somewhat uncertain," 468 U.S. at 637, and will be "difficult" to discern. Id. at 636.

Although not sufficient by itself, the approach of excluding commercial associations as having no First Amendment protection for membership discrimination is appropriate. Justice O'Connor is correct, of course, that freedom of commercial association is entitled to "only minimal constitutional protection." Roberts, 468 U.S. at 634 (O'Connor, J., concurring); see also, e.g., Hishon v. King & Spalding, 467 U.S. 69, 78 (1984). The first part of

the test proposed here recognizes that distinction by classifying as commercial, and therefore subject to state regulation rationally related to legitimate governmental interests, any organization whose involvement in commercial activity is more than insubstantial.<sup>20</sup>

The remaining element in the analysis, though, is that individual members of the organization may choose to associate or not to associate for any number of reasons. Any test focusing solely on the

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<sup>20</sup>A court should not be required to determine whether the organization's activities are "predominantly" commercial. Whenever the level of business or commercial involvement is significant (i.e., not insubstantial or more than minimal), the compelling state interest in eliminating discrimination must take precedence over "potentially expressive activities that produce special harms distinct from their communicative impact." See Roberts, 468 U.S. at 628. "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." Id. at 636 (O'Connor, J., concurring) (emphasis added).



purposes and activities of the organization thus ignores the other half of the picture--the activities and motivations of the members. No matter what an organization says its purposes are, if a substantial motivation for individuals to join the organization is to gain business or commercial advantages, then the organization fulfills a commercial function and cannot be considered to be "private" in a constitutional sense.

"[L]ike violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact," gender discrimination in publicly available goods, services or other advantages is "entitled to no constitutional protection." Roberts, 468 U.S. at 628 (citing Runyon v. McCrary, 427 U.S. 160, 175-76 (1976)) (emphasis added). "Invidious private discrimination



may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." Norwood v. Harrison, 413 U.S. 455, 470 (1973), quoted in Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (emphasis added). Whenever gender-based membership limitations operate to bar women from access to business advantages available to men, states' legitimate interests in prohibiting discrimination must take precedence over claimed rights of associational freedom.

When this test is applied to Rotary International, it is clear that Rotary plays a distinct commercial role and that its claimed associational rights must therefore be subject to regulation by narrowly drawn, content-neutral state

statutes prohibiting membership discrimination on the basis of gender. The California courts have held that both Rotary International and the local Duarte club, as organizations, have commercial attributes and are therefore "business establishments" under the Unruh Act.<sup>21</sup> (J.S. App. C-16 to C-27.) Moreover, whether or not the organizations have substantial business or commercial purposes, the evidence is overwhelming--in this case, in the Seattle litigation and elsewhere--that business or commercial advantages are a very substantial, if not the primary, motivation for individuals to join the Rotary organization.

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<sup>21</sup> Indeed, the record demonstrates that Rotary International is a business in itself, with an administrative organization, a multi-million-dollar budget, and a central staff of more than 350 employees. It receives revenues from club dues, conference fees, subscriptions to a variety of publications, sales of advertising, and license and royalty fees for use of Rotary insignia.

A "variety of goods, privileges and services flow from membership in a local Rotary club." (J.S. App. C-29.) Rotary clubs serve as meeting places where valuable contacts with other local professionals and business leaders are made and cultivated. Through the neutral ground of civic and charitable activities, proverbial "old boys" networks are developed.<sup>22</sup> Corporate employers frequently believe that these contacts are valuable enough that they pay membership dues for key employees to belong to Rotary. (J.S. App. C-26; App. D-1; E-9.) Members who pay their own dues generally deduct those dues on federal income tax returns as "reasonable and necessary" business

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<sup>22</sup>See, e.g., Burns, The Exclusion of Women From Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 Harv. C.R.-C.L. L. Rev. 321 (1983); Goodwin, Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door, 13 Sw. U.L. Rev. 237 (1982).

expenses "primarily" and "directly" related to business purposes. (J.S. App. C-26; App. C-1; E-9; H-1.)

This evidence leaves no doubt that business concerns are a motivating factor in joining local clubs. While Rotarians perform numerous and commendable charitable services at the local, national and international levels, the evidence establishes that there are business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers.

. . . By limiting membership in local clubs to business and professional leaders in the community, [Rotary] International has in effect provided a forum which encourages business relations to

grow and which enhances the commercial advantages of its members.

(J.S. App. C-26.)<sup>23</sup>

The entire Rotary organization is based on the "principle" of professional classifications. Its membership is limited to active business and professional leaders. (E.g., Appellant's Br. at 7-8.) The purpose, and the reality, of Rotary membership is that it provides business contacts and commercial advantages to those who join. When women are excluded from Rotary, they are not just denied the opportunity to contribute to society; Rotary membership is also, quite literally, admittance to the established power structure in many communities. Rotary's

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<sup>23</sup>"Membership in Rotary can enhance the careers of [executives] and professionals." (App. M-5.) Evidence in the Seattle litigation confirms that the business advantages Rotary membership provides is a primary motivation for members to join. (App. B-1; C-2 to C-3; E-6 to E-7; H-1.)

refusal to admit women blocks their access to many of the advantages men have enjoyed for years and perpetuates the "barriers to economic advancement," see Roberts, 468 U.S. at 626, that have historically kept women from achieving equality with men in the business world.

#### CONCLUSION

The existing record clearly shows that Rotary is a large, diverse organization with an inclusive membership and that women already participate in its activities to a substantial degree despite their exclusion as voting members. The record also establishes that admission of women would have no significant impact on any protected expressive activities of the organization or its members and that, despite its self-serving official statements, Rotary in fact has substantial business purposes and functions which are a primary

motivation for members to join.<sup>24</sup>

The Court should reject Rotary International's contention that the First Amendment excuses it from complying with narrow, content-neutral state statutes requiring public accommodations and advantages to be available to all citizens without discrimination on the basis of

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<sup>24</sup>Nevertheless, the Court should be aware that, as discussed throughout this brief, many additional facts demonstrating the large, non-selective and business-related character of the Rotary organization could be presented by other litigants in other circumstances. No matter what the Court rules in this case involving the Duarte, California Rotary club, it should not foreclose other clubs from challenging--in the pending Seattle litigation or elsewhere--Rotary's outdated and discriminatory membership policy.



gender. The judgment of the California Court of Appeal should be affirmed.

DATED: January 28, 1986.

Respectfully submitted,

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and "AWARE: Accept Women  
As Rotary Equals"

JAN 28 1987

JOSEPH R. SPANIO  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

—v.—

*Appellants,*

ROTARY CLUB OF DUARTE, et al.,

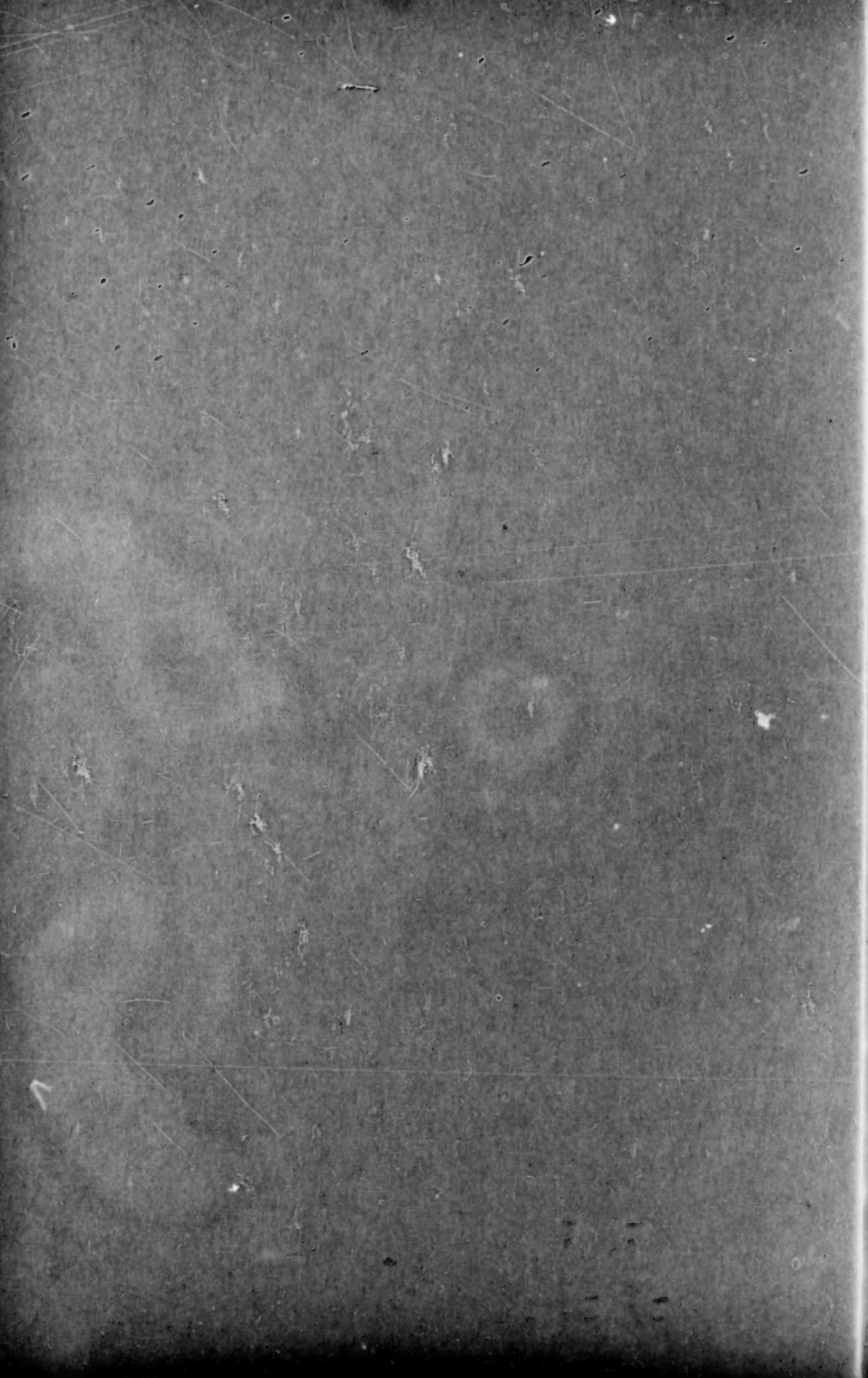
*Appellees.*

ON APPEAL FROM THE  
COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT

**APPENDIX TO THE BRIEF OF THE  
ROTARY CLUB OF SEATTLE-INTERNATIONAL  
DISTRICT, et al.**

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROTARY CLUB OF SEATTLE - )	
INTERNATIONAL DISTRICT, )	NO. C86-1475M
et al., )	
Plaintiffs, )	DECLARATION OF
v. )	PHILIP ANDERSON
ROTARY INTERNATIONAL, )	
Defendant. )	

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PHILIP ANDERSON declares:

1. I am a dentist in private practice, with offices located in Seattle, Washington.

2. I have been a member of Rotary since 1979, and have been President of the Burien/White Center Rotary Club since July 1986. Our club has about sixty members.

3. Rotary's membership classification scheme never prevents us from admitting new members. I am unaware of anyone ever being refused membership in the Burien/White Center Rotary Club because a classification has already been filled. If we already have a member engaged in the same general area of business or profession, we simply find a new or different classification to describe the new member.

4. The Burien/White Center Club actively recruits new members. If someone has a personal or professional tie with



someone, we will approach that person to consider membership in Rotary. Generally, without any such tie we will not approach a a person to ask them to consider membership in our club.

5. Early during my term as president of the Burien/White Center Club I sent members of the club a questionnaire asking their opinions on a number of issues, including their position on admitting women as Rotary members. While the club decided against taking any form of legal action ourselves, we did specifically agree to recognize female Rotarians admitted by other clubs and to agree to honor the "make-up" cards they presented.

6. The Burien/White Center Club would admit women as members if it were permitted to do so by the Rotary International organization. The Rotary's rule prevents us from associating as Rotarians with many members of the community who we believe could benefit our club, and who could be benefited by Rotary membership. It is my sincere hope that Rotary International changes its policy to permit us to associate with women as full members of the Rotary in the future.

I CERTIFY under penalty of perjury under the laws of the United States of America and of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington, on October 31, 1986.

/s/  
PHILIP ANDERSON, D.D.S.

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROTARY CLUB OF SEATTLE - )	
INTERNATIONAL DISTRICT, )	NO. C86-1475M
et al., )	
Plaintiffs, )	DECLARATION OF
v. )	HWA-TSUN FENG
ROTARY INTERNATIONAL, )	
Defendant. )	

---

HWA-TSUN FENG declares:

1. I am Legal Counsel for SeaFirst Bank and a charter member of the Rotary Club of Seattle-International District (the "Club").

2. Prior to joining the Club, I learned that Rotary International's policy excluded the admission of women to local Rotary clubs. I considered this very carefully and debated long and hard before joining the Club. Ultimately I did join in 1984. At that time I was a lawyer in private practice and looked to the Club as a source of business contacts. I also felt Seattle's International District would be benefited by the Club.

3. I believe that Rotary is a great organization and I subscribe to its principles with one exception -- the policy of excluding women. During the first two years of this Club's existence, it became

clear to me that our club would be better, more diverse and more effective with women.

4. I have been active in community affairs in Seattle and have served as president of the Chinese Information & Service Center, Chairman of Minority Representation and the Law Committee of the Seattle-King County Bar Association and a member of the 1985-1986 Leadership Tomorrow class sponsored by the Chamber of Commerce and the United Way. Through those organizations I have met a number of dynamic and accomplished professional and business women who I felt would be ideal members of our Club.

5. I believe that both the Club and myself personally have suffered because of the Rotary International's policy on exclusion of women. For example, one of our members, a vice president of a non-profit organization, had to resign for health reasons. The woman who was president of the organization, was unable to join because of Rotary International's policy. As a result, we were left without any representative of a major non-profit organization in Seattle.

6. I believe that my constitutional rights of freedom of association are

violated by Rotary International's policy and that our Club ought to have the freedom of choice to determine a non-discriminatory membership policy.

This document was signed under the laws of perjury in the State of Washington and is being executed subject to the penalties of perjury.

Dated: 9/15/86

/s/

HWA-TSUN FENG

Place: Seattle

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROTARY CLUB OF SEATTLE - )	
INTERNATIONAL DISTRICT, )	NO. C86-1475M
et al., )	
Plaintiffs, )	DECLARATION OF
v. )	KATHERINE
ROTARY INTERNATIONAL, )	FLETCHER
Defendant. )	

---

KATHERINE FLETCHER declares:

1. I am chair of the Puget Sound Water Quality Authority, an independent state agency which was formed to prepare and implement a comprehensive plan to protect and improve the water quality in Puget Sound.

2. On September 4, 1986 I was admitted to membership in the Rotary Club of Seattle - International District. I will pay my club dues personally but will deduct them as a business expense on my tax return.

3. I have been very active in community affairs and recognize Rotary as an extension of that involvement. For example I have served on the boards of the Washington Environmental Foundation, The Puget Sound Alliance and the Northwest Renewable Resources Center.

4. In my view, the Rotary organization in Seattle holds a special position of influence and prestige among the business and civic leaders. I welcome the opportunity to join Rotary for a number of reasons, among them:

a. An important aspect of my job is education of the community and explanation of how the activities of the Authority affect the business community. Membership in the Rotary Club provides me with unique and valuable access to a broad network of business and community leaders.

b. Membership in the Rotary is an opportunity to work with diverse representatives of the business community.

c. I have always been public-service oriented and look forward to participating in valuable community service projects sponsored by Rotary.

d. One of the attractions of the Rotary organization is the opportunity to be part of the Rotary family -- to visit other clubs in the Seattle area and also out-of-town and international clubs. Not only will this provide the opportunity for fellowship but it will



serve as a source of additional contacts that I will find useful in my profession.

5. For years, Rotary has provided scholarships and international exchanges for both men and women. Additionally, women, including myself, have been guests at Rotary luncheons. I was a speaker at a prior meeting of this Club. In fact, just prior to accepting the invitation to join this Club as a member, I had been invited to be a guest speaker at another Rotary club. The irony of my circumstances underscores the inequity of the policy refusing admission to women.

6. If Rotary International revokes or suspends the charter of the Rotary Club of Seattle - International District, I will suffer irreparable harm because I will be precluded from participating in the activities listed above, will have no status as a Rotarian and will continue to be excluded from Rotary activities. I look forward to being an active and productive member of this club.

This document was signed under the laws of perjury in the State of Washington

and. is being executed subject to the penalties of perjury.

/s/

KATHERINE FLETCHER

Dated: Sept. 15, 1986

Place: 217 Pine St. #1100  
Seattle, WA 98101

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROTARY CLUB OF SEATTLE - )	
INTERNATIONAL DISTRICT, )	NO. C86-1475M
et al., )	
Plaintiffs, )	DECLARATION OF
v. )	JOHN HOUGH
ROTARY INTERNATIONAL, )	
Defendant. )	

---

JOHN D. HOUGH declares:

1. I have been a member of the Seattle No. 4 Rotary Club ("No. 4 Club") for six years. Although I am not currently serving as an officer of the No. 4 Club, I have been the Program Director in the past. For the past four years I have been the organizer of a series of political debates, hosted by the No. 4 Club, which are designed to focus the public's attention on the key issues of the elections.

2. My membership in the No. 4 Club has been supported by my employers during the six years I have been a member. My employers have paid all my Rotary fees and dues because of the business and professional benefits which I receive as a member of Rotary.

3. The No. 4 Club is a large Rotary chapter which currently has more than 750 members. In addition, I am aware of over

thirty other clubs in the Seattle metropolitan area which I can attend to make up any meetings I miss.

4. The No. 4 Club is recognized as a premier speaker's forum in the Seattle area because of the large number and broad cross-section of business and community leaders which the club's membership represents. For instance, Rotary generally sponsors one or two debates in connection with each election. These may be the most newsworthy events of the club, but we have an extensive array of other speakers throughout the year. Both men and women have spoken before us, representing a wide variety of professions and interests.

5. One recent example of the public political forums provided by Rotary is the October 1986 debate between Brock Adams and Slade Gorton as candidates for the United States from the State of Washington. The debate was advertised by Rotary through normal Rotary channels. The press also advertised it independently, listing it, for instance, in the television section of the local newspapers. The public was not precluded from attending the debate, and in fact, a large number of non-Rotarians did attend. In addition, we accommodated the

overwhelming interest of the press to attend and report on the debate.

6. During my tenure as program director for the No. 4 Club, I arranged the speakers and presentations for our meetings. I attempted to find speakers who would be both interesting and informative to listen to, and did not consider the sex of the speaker when inviting them to appear before us.

7. Nearly 70% of the No. 4 Club recently voted to admit women as members, if the bylaws of Rotary International permitted. The Rotary Constitution and Bylaws presently prevent us from accepting as Rotarians many women who meet all of the other criteria for membership.

I CERTIFY under penalty of perjury under the laws of the United States of America and of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington,  
on Nov. 4, 1986.

/s/

JOHN D. HOUGH

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROTARY CLUB OF SEATTLE - )	
INTERNATIONAL DISTRICT, )	NO. C86-1475M
et al., )	
Plaintiffs, )	DECLARATION OF
v. )	JIM JOHNSON
ROTARY INTERNATIONAL, )	
Defendant. )	

---

JIM JOHNSON declares:

1. Identity: I am President of the Rotary Club of Seattle-International District ("the Club), a Seattle-based organization chartered by Rotary International.

2. Rotary International: Rotary International is a world-wide, nonprofit corporate association of over 22,000 local clubs with over 1 million members in 152 countries. Rotary International is an Illinois corporation and has its headquarters in Evanston, Illinois.

3. The objective of Rotary is "to encourage and foster the ideal of service, and in particular to foster:

"First. The development of acquaintances as an opportunity for service.

Second. High ethical standards in business and professions; the recognition of the worthiness of all useful occupations . . .

Third. The application of the ideal of service by every Rotarian to his personal, business, and community life.

Fourth. The advancement of international understanding, goodwill, and peace through a world fellowship of business and professional men united in the ideal of service."

(Appendix 1, Rotary International Constitution, Article III; emphasis added.) The emphasis of the club centers on community service and the businesses and professions of its members.

4. Rotary International activities are governed by the "4-Way Test" of the things Rotarians "think, say or do":

1. Is it the TRUTH?
2. Is it FAIR to all concerned.
3. Will it build GOODWILL and BETTER FRIENDSHIPS?
4. Will it be BENEFICIAL to all concerned?

The "4-Way Test" is advocated by Rotary as a check for Rotarians' "thoughts, words and deeds" and is described as being "used successfully around the world in business,



government and schools as an effective measuring stick for conduct." (Appendix 2, The 4-Way Test.)

5. When Rotary was founded in 1902, it was recognized that good fellowship would produce increased business for the members. This objective was expressed by Rotary's founder, Paul Harris, in his publication My Road to Rotary:

These early Rotarians helped each other . . . In the main their efforts were directed to keeping each other in business, helping each other to attain success. They patronized each other when it was practical to do so, exerted helpful influence, and gave wise counsel when it was needed.

(Appendix 3, Rotary Basic Library, Vocational Service, Vol. 3 at 7.) This philosophy is still the essence of Rotary today.

6. Rotary International's Policy on Women: Rotary International charters, supervises and controls local clubs. Local clubs are required to adopt a uniform constitution (Appendix 4) and bylaws (Appendix 5) prescribed by Rotary International. (Appendix 1, Articles III and IV.) Both the Constitution of Rotary International and the local constitution restrict membership to men--adult male

persons." (Appendix 1, Article IV; Appendix 4, Article V.) Rotary International, through its Board of Directors and Council on Legislation, refuses to admit women. In March 1986 the California Court of Appeals held that Rotary International and its local clubs in California were prohibited from excluding females from membership. Even after that decision, on May 28, 1986, the Board of Directors of Rotary International released a statement of official policy reaffirming that the Rotary's "Constitutional prohibition against female membership be adhered to by all Rotary clubs, whether in California or elsewhere." (Appendix 6, Statement of Official Policy of Rotary International Regarding Membership by Females.)

7. Rotary Club of Seattle-International District: The Club was formed and chartered by Rotary International in 1984. Initially, by unanimous vote the Club sought to admit women by adding a section to the Standard Club Constitution providing for admission of "all qualified potential members without limitation as to ethnicity or sex." (Appendix 7.) The Club was informed that the charter would not be granted unless Club

membership was restricted to males. The Club then conformed to the Standard Club Constitution, was chartered and has since grown to a diverse membership of approximately 40 men.

8. Open Membership Policy:

a. Membership Procedure. The Club does not have an upper numerical limit on its membership and is actively seeking new members. The membership is neither small nor selective. The Club solicits and recruits dues paying members on a nonselective, open invitation basis. The only requirements are that the member be an "adult male person" of "good character and good business or professional reputation." (Appendix 1, Article IV.) Members must be an owner, manager or supervisor of a business or organization. There is no selection process and the nomination process is open and easy: Club members simply propose a nominee to the Club's Board of Directors. (Appendix 8, Sample Membership Application.) The Board has never disapproved a nominee. Membership turns over constantly; in the short time that we have been a club, there has

been approximately a 15% turnover in membership each year. Average attrition in Rotary clubs is 10%.

b. Business Classification:

Each active Rotary member is classified according to his business or profession. (Appendix 9, List of Business and Professional Classifications.) According to the local Club constitution, the "membership shall consist of but one man from each classification" except in the case of the news media, religion and diplomatic services classification. (Appendix 4, Article V.) The classification system assures a diverse membership and has never been an exclusion to membership; the Club always finds a classification for any prospective member. As we were taught in president's training, "Make the classification fit the man. Don't lose a potentially good member . . . find a classification that will cover his line of endeavor." (Presidents Elect Training Seminar at 10.)

9. Attractions of Membership in the Club: Prospective members are attracted to our Club because they want to serve their communities and because they recognize the value of augmenting their business and professional contacts. Many

members share business opportunities and make business referrals to fellow Rotary members. Our members take their responsibilities seriously and fulfill their obligation to serve on at least one service committee each year and to have a consistent attendance record at meetings. Rotary membership brings prestige, a worldwide network of business, professional and personal contacts and access to the leaders in the community.

The following excerpt from Forbes magazine, March 24, 1986, describes the trend in Rotary memberships, a phenomenon we see in our Club:

The business club . . . is making a strong comeback. Rotary International . . . passed the million-member mark last month . . . . A developing middle and up-middle class recognizes a need in their communities for this type of group . . . the ranks are filling up with young professionals who want to tune in to colleagues and communities.

(Appendix 10 includes examples of recent news coverage of Rotary and the admission of women to men's service clubs.)

10. Public Meeting Place: The Club's weekly meetings are held in a public location, the Four Seas Restaurant, in



Seattle. Members, visiting Rotarians, guests, under a liberal guest policy, and even strangers attend the meetings.

11. Activities: Our Club's activities include the following:

a. Association with Rotary International: A variety of goods, privileges and services flow from membership in the Club. These include membership in Rotary International, receipt of the official Rotary magazine and our local club publication, the International Spokesman, and the right to wear and display the Rotary emblem. Additionally, Rotary International sells numerous directories, pamphlets, forms, supplies and publications ranging from publications on vocational service to booklets on leadership and community service. (Appendix 11.) The Club pays license fees and royalties for franchise products to Rotary International and uses those products and the trademark insignia of Rotary in its service activities.

b. Business enhancement: The Club's yearly dues of \$195 include \$75 for three prepaid advertisements in the International Spokesman in which members

commonly advertise their business or professional services. (Appendix 12, International Spokesman.) Additionally, the publication features or "spotlights" individual members, with an emphasis on their professional life and service to the Club. From time to time, members also give "classification talks" which emphasize their occupations and highlight the specifics of their businesses. About 50% percent of the members pay their dues through checks drawn on their business accounts and the common practice for members is to deduct their dues as "reasonable and necessary" business expenses on the incomes taxes.

c. Speakers: The Club invites speakers to its regular meetings in order to inform its members about business and service opportunities in the Puget Sound region. Representative speakers include: John Gilmore, Executive Director, of the Downtown Seattle Association (the "Business Enhancement Plan" for Seattle's downtown area); Kathy Fletcher, Chair, Puget Sound Water Quality Authority (pollution clean-up requirements); Ted Choi, President of the Chinese Nursing Home (need and plans for such a facility); and Diego



Futos, Director of Church and Community Involvement for the Union Gospel Mission (needs of the homeless and hungry).

d. Service: The Club maintains Youth, Vocational Service, International Service, Club Service and Community Service committees. These committees organize Club services such as supporting international exchange students, advising high school students about careers, and aiding the homeless and senior citizens. Currently a project is underway to provide daycare in Seattle's International District. The services are made available to the public and are in no way restricted to Rotarians.

e. Vocational Service: Vocational service is an integral part of the Club's activities and is a service segment mandated by Rotary International. The president's training manual states:

VOCATIONAL SERVICE lies at the heart of Rotary because it is rooted in the classification principle, which distinguishes Rotary from other organizations. Through vocational service, each Rotarian is charged with the obligation to convey the spirit of Rotary to his colleagues in his business or profession and, in return, to represent the ideals of his vocation in the Club.

(Appendix 13, Presidents Elect Training Seminar, Vocational Service at 18-20.) Suggested activities include having trade shows, using a trade association official for programs, organizing a trade fair in cooperation with the Chamber of Commerce, having vocational discussions with students to prevent them from becoming "anti-business" and tapping the resources of retired business executives. Each year the Club prepares a Summary of Club Plans and Objectives, including a segment on vocational service. (Appendix 14.) Our Club's 1986 plans include monthly visits to members' places of business for purposes of fellowship, vocational knowledge and member recognition; admission of professional women to membership; and a vocational exchange with local students.

12. Admission of Women to Club Membership: Since learning of Rotary International's policy barring admission of women, the Club has worked actively to change that policy from within. A Women in Rotary Committee was formed in 1985 and the Club worked aggressively to have this matter decided affirmatively at its district convention (the Club is a member of

District 503) and by the Council on Legislation, Rotary's governing body. At the 1985 District 503 convention, the delegates gave strong support for admission of women. Nonetheless, at the February 1986 meeting of the Council on Legislation, Rotary International rejected for the fifth time a proposal to admit women. At the 1986 District 503 convention, the delegates voted overwhelmingly in favor of admitting women (81-8). While there is now overwhelming support at the district level, Rotary International still refuses to admit women. The Club has explored alternatives and is left with the sad conclusion that legal action is its only alternative at this point in time.

13. On July 31, 1986, the Club met and voted unanimously to admit women to membership. On September 4, 1986, the Board of the Club approved the membership applications of fifteen new members, all of whom are female. On September 13, 1986, the Club forwarded these names to the General Secretary of Rotary International as required by the Club bylaws. (Appendix 15 is a list of the women admitted.)

14. Admission of women to the Club will have a positive impact on the diversity and richness of the Club's membership. The Club has no secret rituals or meetings and has no activities or projects which would be considered embarrassing to women (or to men for that matter). The objectives of Rotary International are sex neutral. (Appendix 1, Article III.) Moreover, Rotary's public esteem will be enhanced by admission of women. Within the Rotary family, numerous clubs have endorsed the concept of admitting women. In Seattle, for example, Seattle's largest Rotary Club voted in favor of admitting women, although that club has taken no specific action to admit women.

15. Women have indirectly been part of the Rotary family for many years without any negative impact on the male members. Business and community leaders, including women, are invited to speak at weekly meetings. For example, Kathy Fletcher, Delores Sibonga, Virginia Galle, Kathy Wong and Ruthe Ridder have spoken to the Club. Women are invited to attend Rotary meetings as guests. Both the high school (Interact) and college (Roteract) service clubs sponsored by Rotary include

women in their memberships. And Rotary International provides scholarships and international exchange opportunities to girls and women.

16. Harm From Loss of Membership and Charter: The Constitution of Rotary International requires all clubs to "ratify and agree" to be "bound in all things, not contrary to law, by [the] Constitution and the By-Laws of Rotary International." (Appendix 1, Article IV.) Our Club believes that the exclusion of women is, in fact, contrary to federal and state law and violates the constitutional rights of free association of our members. Based upon the experience of the Rotary Club of Duarte, California and Rotary International's strong reaffirmation of its policy against admitting women, we reasonably believe that our Club's admission of women will result in attempted revocation of the Club's charter. The Club and its members depend on the Club's good standing as a chartered club of Rotary International. This action will result in irreparable harm, not compensable by money, to the Club, its members and prospective female and male members.



17. The irreparable harm and loss includes the following:

a. Loss of the official status as a Rotary Club;

b. Loss of opportunity for solicitation and initiation of new members and continued growth as a Rotary Club;

c. Loss of the ability to use the Rotary Club symbol, name, insignia and other identification with Rotary International.

d. Service activities, such as sponsoring an exchange student, providing daycare services or contributing to Rotary International's efforts to eradicate polio, all of which require fund raising, depend on the ability to use the Rotary name, insignia and materials in promoting among its members the good works that the Club wishes to undertake. The Club could not use the Rotary name for fund raising for service activities, an association which is clearly beneficial; community service projects could not be carried in the name of Rotary and this lack of sponsorship may result in termination of some projects;

e. The Club obtains umbrella insurance coverage, including directors

and officers liability insurance, through Rotary International. Such insurance is virtually impossible to obtain in this tight insurance market without the sponsorship of a group plan such as Rotary International. Good business practice dictates that the club maintain the insurance and loss of the charter would preclude this;

f. The Club could not participate in the International Vocational Exchange, a program to send non-Rotarian young professionals abroad and the Club could not accept an international exchange student sponsored by Rotary;

g. The Club would lose revenue from and fellowship benefits of visiting Rotarians; since attendance at 60% of the meetings is mandatory, these "make-up" visits by members of other clubs are an important aspect of Rotary;

h. Members would be deprived of the Rotary fellowship, would be excluded from visiting other local and international Rotary clubs, and would be deprived of the opportunity for personal growth and reward in the areas of leadership and business within the Rotary Club itself and the business community;



i. Members would lose the recognition and use of the Rotary pin and the Rotary symbols and insignia and all of the benefits of Rotary described above;

j. Members would lose the benefit of a valuable, worldwide network of professional and business contacts;

k. Members would be deprived of their constitutional right of association and the opportunity to share business and professional matters with female Rotarians.

This document is signed under the laws of perjury of the State of Washington and is being executed subject to the penalties of perjury.

/s/

\_\_\_\_\_  
Jim Johnson

Dated: 9/15/96

Place: Seattle

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROTARY CLUB OF SEATTLE - )	
INTERNATIONAL DISTRICT, )	NO. C86-1475M
et al., )	
Plaintiffs, )	DECLARATION OF
v. )	CAPTAIN JAMES
ROTARY INTERNATIONAL, )	L. LANSBERY
Defendant. )	

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CAPTAIN JAMES L. LANSBERY declares:

1. I am the Training Director for the Department of Public Safety and the Commander of the Public Safety Training Academy for the State of Alaska.

2. I have been a member of Rotary for approximately two years, and am currently the President of the Rotary Club, Sitka, Alaska. The Sitka Club has about forty-three members.

3. Our club actively recruits new members. Current members suggest possible new members from their business and personal contacts whom they believe would benefit our club and be benefited by membership in Rotary. These people are then invited to attend several meetings. If we feel they would meet the criteria for membership in Rotary we then decide if they should formally be asked to apply.

4. We have never refused membership to anyone because a professional classification has already been filled. We have been very imaginative in assigning or creating new classifications if necessary to be able to admit new members. For example, several of our members are attorneys, but we have placed them in different categories.

5. The Sitka Club was one of the first clubs in Rotary District 503 to actively seek changes in the Rotary Constitution and Bylaws to permit admission of women as members of the Rotary Organization. Prior to the last full Rotary Legislative Council, the Sitka Club was one of about twenty-three clubs to sponsor a rule change which would have permitted the admission of women. As soon as the change was voted down by the Council, the Sitka Club voted down by the Council, the Sitka Club voted to resubmit a similar measure to the District Convention. Instead of being sponsored by just our club, we agreed to share sponsorship of the measure with the District as a whole. All but three clubs in the District voted in favor of the proposal.

6. If permitted by the Rotary Constitution and Bylaws, Sitka Club would certainly admit women as members. The admission of women could only benefit the club. There is no question but that the overwhelming preference of the members of the Sitka Club and the preference of the great majority of the Rotary Clubs at least in this District, is to associate freely with women as full and equal members of Rotary. The only reason the Sitka Club has not yet admitted women as members is Rotary International's strict enforcement of the male-only membership policy and because of the Club's concerns about the injury we would suffer to our ability to function as a Club if we were to lose our Rotary charter.

7. Women often speak before the Sitka Club and other Rotary Clubs. Approximately one-third of the speakers at the Sitka Club are women. We will invite anyone to speak who is involved in an area we are interested in, regardless of the gender of the speaker. We also have women come to our meetings as guests.

8. It is my genuine hope that Rotary International will change its Constitution and Bylaws to permit women to become

Rotarians. The women themselves would clearly benefit from membership in Rotary and the inclusion of women would benefit our club and the organization as a whole.

I CERTIFY under penalty of perjury under the laws of the United States of America and of the States of Alaska and Washington that the foregoing is true and correct.

EXECUTED in Sitka, Alaska, on Oct. 31, 1986.

/s/  
CAPTAIN JAMES L. LANSBERY

STATE OF ALASKA                    )  
  ) ss.  
FIRST JUDICIAL DISTRICT )

Certification/Notarization

This certifies that on this 31st day of October, 1986, personally appeared before me James Lansbery, to me known, and under oath administered by me he signed the foregoing declaration, declaring it to be true and correct as he verily believes, and that he was signing the declaration for the uses and purposes set forth therein, and as his free and voluntary act and deed.

/s/ Donald L. Craddus  
Notary Public for Alaska  
My Commission expires:  
Oct. 13, 1988

3337H

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROTARY CLUB OF SEATTLE - )	
INTERNATIONAL DISTRICT, )	NO. C86-1475M
et al., )	
Plaintiffs, )	DECLARATION OF
v. )	CAROL SMITH
ROTARY INTERNATIONAL, )	
Defendant. )	

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CAROL SMITH declares:

1. I am a long-time resident of Seattle. I am currently semi-retired after the recent sale of my business, Kennell Ellis Photography ("Kennell Ellis"). I became president of Kennell Ellis in 1971, after having worked in the company for eleven years in a variety of capacities.

2. In addition to my professional experience, I am a long-time civic activist in this community. I have been a board member of the Chamber of Commerce and an officer of the Chamber. I am on the board of Leadership Tomorrow, a group which each year identifies fifty outstanding young business people and offers them leadership training opportunities. I serve on the advisory board of the Boy Scouts of America, Chief Seattle Council.



3. In 1980, I was given an award for "Outstanding Contributions" to small business by the City of Seattle. That award was presented to me at a meeting of the Seattle No. 4 Rotary Club ("No. 4 Club").

4. Before his death in 1971, my husband, Ed Kennell, was owner of Kennell Ellis. The business had nine separate studios and employed six or seven photographers. I worked in the business in a number of capacities, including bookkeeper, secretary and salesperson. After's Ed's death, I inherited the business and became its president.

5. Ed joined the No. 4 Club in 1960. At that time he was given the professional classification of photographer. Prior to his death, Ed's father had been assigned the photographer classification in the No. 4 Club. Because Ed and his father before him were members of Rotary, the photography needs of the No. 4 Club were referred to Kennell Ellis.

6. The No. 4 Club has a yearbook which includes all the members' pictures. New members were routinely referred to Kennell Ellis to have these pictures taken and one of our photographers would take



the portrait. Often additional personal business resulted from these sittings.

7. Many Rotarians are prominent in the business community. In addition to the yearbook photography business, Kennell Ellis photographers were often asked to take other business and promotional photographs for fellow Rotarians. This business was a significant asset to Kennell Ellis.

8. When Ed died in 1971, the the professional classification of photographer in the No. 4 Club was filled by someone else. Immediately thereafter, Kennell Ellis stopped receiving the business of Rotary yearbook clients. Since, in addition to the new members' photographs, older members were periodically rephotographed to update the yearbook, Kennell Ellis effectively lost a total of 400 customers, the size of the No. 4 Club at the time. In addition, Kennell Ellis lost all the additional personal and professional photographic requests which resulted from these membership portraits.

9. During the time Ed was a Rotarian, I also relied on Rotary to provide a peer group for obtaining business and professional advice. The advice I got from

fellow Rotarians helped me to better manage my responsibilities at Kennell Ellis. For instance, often the business and professional expertise many Rotarians have developed provided me with shortcuts to solve difficult business problems, allowing me to manage the business more effectively and economically. The contacts with this peer group and the business advice ceased when Ed was no longer a member of Rotary.

10. Even though I continued to own and operate Kennell Ellis after Ed's death, I was not able to join Rotary simply because I am a woman. I had made a number of business and professional contacts during my association with Rotary while Ed was a member. I would have joined the organization after Ed's death if Rotary's male-only membership policy had not precluded me from doing so.

11. I have read the affidavit of Philip H. Lindsey which has been submitted to the Court in the present case. Specifically, I read paragraphs 10, 11 and 12 in which Mr. Lindsey states that the primary purpose of Rotary is to encourage fellowship and that it is Rotary's policy to discourage members from obtaining business

advantages from their Rotary membership. Although this may represent "official" Rotary policy on paper, I know from personal experience that, in fact, significant business and professional benefits flow directly from Rotary membership. Moreover, despite the purported "policy" Mr. Lindsey refers to, Rotarians individually and as a group do consciously and deliberately direct patronage to businesses owned by Rotary members. Kennell Ellis received significant benefits for more than ten years while my husband Ed was a member of the No. 4 Club. Those benefits ceased upon his death when I, as a woman, was considered ineligible to join Rotary.

I certify under penalty of perjury under the laws of the United States of America and of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington,  
on Nov. 3, 1986.

/s/

CAROL SMITH

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROTARY CLUB OF SEATTLE - )  
INTERNATIONAL DISTRICT, ) NO. C86-1475M  
et al., )  
Plaintiffs, ) DECLARATION OF  
v. ) BARBARA  
ROTARY INTERNATIONAL, ) VANDERKOLK  
Defendant. )

BARBARA VANDERKOLK declares:

1. I am the president of Barbara Vanderkolk & Associates, Inc., a management consultation and training firm located in Seattle, Washington.

2. On September 4, 1986 I was admitted to membership in the Rotary Club of Seattle - International District. I will pay my club dues through my business account and will deduct them as a "reasonable and necessary" business expense on my tax return.

3. I joined Rotary "both to give and to get." I look forward to the opportunity to give ideas, talents, professional contacts and business expertise to my fellow Rotarians. Likewise, I anticipate receiving the same in return. I expect that Rotary membership will have a direct benefit to me as a business owner. It provides an opportunity to meet new people

and to learn about their businesses and professions, information which will aid me in consulting for other businesses.

4. The Rotary Club in Seattle occupies a special place among civic organizations and is well recognized as being a place where the "movers and shakers" of Seattle meet to foster business and civic relationships. I joined Rotary as opposed to another service club because it has the largest cross-section of members and because it is based upon a business and professional orientation rather than a pure service orientation. Its prestige is directly related to the membership it has attracted.

5. I have been very active in business and community organizations and see the opportunity to join Rotary as a continuation of this commitment. For example, I am on the Board of Directors and Vice President of Women + Business Inc., on the Board of Directors of the Women's Business Center, a charter member of City Club, Chair of the Visiting Committee, University of Washington, Department of Psychology, past State Chair of the Women's Political Caucus, and a member of the

1985-86 Leadership Tomorrow class sponsored by the Chamber of Commerce and the United Way.

6. I have been invited and in fact have spoken to Rotary clubs on one occasion. It is an inexplicable anomaly and inequitable that Rotary has found my presence as a speaker to be beneficial to its members and yet, despite a request by me some ten years ago, has refused to permit women as members. As more and more women enter the work force and attain significant positions in business and the professions, it is all the more important for them to be part of and have access to organizations such as Rotary International.

This document was signed under the laws of perjury in the State of Washington and is being executed subject to the penalties of perjury.

Dated: 9/15/86      /s/  
BARBARA VANDERKOLK

Place: Seattle



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROTARY CLUB OF SEATTLE -	)	
INTERNATIONAL DISTRICT,	)	NO. C86-1475M
et al.,	)	
	)	AMICUS CURIAE
Plaintiffs,	)	BRIEF OF WASH-
	)	INGTON STATE
v.	)	HUMAN RIGHTS
	)	COMMISSION AND
ROTARY INTERNATIONAL,	)	ATTORNEY
	)	GENERAL
Defendant.	)	OF WASHINGTON
	)	STATE

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I. STATEMENT OF THE CASE

A. Nature of the Case

Rotary Club of Seattle -- International District voted on September 4, 1986, to admit women as members contrary to Rotary International's membership policy which excludes women. The local club brought this action to have the International's male-only membership policy declared invalid under the public accommodation sections of the Washington State law against discrimination, Ch. 49.60 RCW, and to enjoin the International from revoking the local club's charter for having admitted women members.

B. Interest of these Amici

The Washington State Human Rights Commission is the agency charged with



enforcing the unfair practice provisions of Ch. 49.60 RCW, including discrimination based on sex in places of public accommodation. The Attorney General is the legal representative of the WSHRC and advises it on matters of interpretation and application of the law against discrimination.

C. Facts and Historical Analysis  
Pertinent to this Amicus Brief

1. Rotary International: The founders of Rotary International envisioned a club of business and professional men who would meet for both social and business reasons.

"... [E]ach member would have an obligation, wherever possible, to put business the way of a fellow-member rather than direct it to an outsider."

DAVID S. NICHOLL, THE GOLDEN WHEEL: THE STORY OF ROTARY 1905 TO THE PRESENT (United Kingdom 1984), p. 34. The organization grew both in numbers and prestige until today it has over 1 million members in 152 countries. Ibid, at p. 269; and Declaration of Jim Johnson, at p. 2. Although Rotary International has a headquarters building in Evanston, Illinois (Johnson Declaration p. 2), its local

clubs meet in a variety of locations accessible to and serving the public. As Rotary's historian, David S. Nicholl, observes:

"In the great capitals of the world members meet and eat once every week in famous hotels or restaurants. Elsewhere, according to size and locality, they meet in inns and pubs and hired halls or rented dining-rooms. Most come for the fellowship and few come for the food. The plaque with the golden wheel can be seen outside hotels and inns and halls in almost every country in the world, apart from nations under Communist rule, within whose borders the absence of the golden wheel is a decision of the rulers not of Rotary, for wherever Rotary is wanted, there it will go, and wherever the sign of the golden wheel is shown, there any Rotarian, of whatever race, creed or country, is welcomed with constant and genuine delight."

Nicholl, op.cit. pp. 475-476. Rotary's membership qualifications are aimed at leaders and high achievers in business and professions, but it does not include women. Constitution of Rotary International, Article IV, Sec. 3; Appendix 1, Declaration of Jim Johnson.

2. Participation of Women in Business and Professions: Women in America

were not expected to be leaders or high achievers in business and professions at the time Rotary was founded. A perceptive historian on the status of women in America, Barbara J. Harris, observed:

"When American women first demanded equal access to the professions, well over a century ago, they confronted two widely held social prejudices. One was the belief that females were intellectually inferior to males and, therefore, rightfully kept in a subordinate position. They were excluded from the professions because they were unfit for any vocation that relied predominantly on mental abilities or on the capacity to make decisions and direct others. The second prejudice held that respectable women should not work outside the home, an idea central the Victorian cult of domesticity.

BARBARA J. HARRIS, BEYOND HER SPHERE: WOMEN AND THE PROFESSIONS IN AMERICAN HISTORY (Greenwood Press, Conn. 1978), at p. 3. Professor Harris further pointed out that this domestic definition of the role of women continued to permeate American social ideology well into the current century. Ibid, at p. 32. Even with the passage of the 19th Amendment, the opportunities for women in the professions

(other than teaching and nursing) did not improve. In 1930,

"The percentage of female lawyers and architects remained stable at 3 percent. In the whole country there were only 60 female CPA's and 151 dentists. . . . The percentage of women doctors declined from 6 percent in 1910 to 5 percent in 1920 and 4.4 percent in 1930. . . . There was a 5 percent quota on female admissions to medical schools from 1925 to 1945."

Harris, op.cit., p. 138.

During the depression of the 1930's the situation of women in business and professions became worse:

"Under the impact of the depression, hostility to female employment reached new levels of intensity. There was virtually unanimous opinion that women should not compete for scarce jobs with men who had families to support. Implicit in this view was the assumption that females did not have families to support and therefore had less right to employment than men."

Harris, op.cit., pp. 141-142.

Attitudes towards working women changed during World War II because labor was then in short supply:

"Almost 7 million women entered the labor force for the first time; the proportion of

working women rose from one-fourth to one-third. More females were employed outside the home than at any previous time in American history."

Harris, op. cit., p. 144. These increases in numbers did not, however, translate into economic equality for women:

"They rarely received the same salaries as men who had held the positions before them. Business-women often complained that they were expected to remain as trainees instead of moving into the ranks of management. Whatever the progress, the real question was whether the change would be permanent. Would the experience of seeing females succeed in positions that they had never filled before break down traditional attitudes about their abilities and the jobs best suited for them?"

Harris, op.cit., p. 145.

A Harvard Business Review study done in 1965 and repeated in 1985, indicates that a significant shift did occur in the attitudes of men toward women executives during the last 20 years. In 1965, 9 percent of the men surveyed had "'strongly favorable'" attitudes toward women executives. Seattle Times/Post-Intelligencer, Oct. 26, 1986, p. K-2. When this study was repeated in 1985, 33 percent held



strongly favorable attitudes toward women executives. Furthermore, "The proportion of men who thought women were 'temperamentally unfit for management' declined from 51 percent to 18 percent." Ibid. In the last 10 years of the period surveyed, 1975-1985, the number of women managers and administrators more than doubled, reaching 4.4 million, or 36 percent of the total, in 1985. In addition,

"A third of Wall Street's younger professionals are female, so are half the people in corporate training programs. Last year, one-third of business school graduates were women. An estimated one percent of senior executives are women."

Seattle Times/Post Intelligencer, Oct. 26, 1986, pp. K-1 and K-2.

Despite these dramatic changes in the participation of women in business management and the professions, women are still excluded from the informal networks of shared ideas, experiences, and decision-making that male executives and professionals enjoy in organizations such as Rotary International. The following example is drawn in particular from academia, but it is generally applicable throughout

the higher levels of business management and the professions:

"Because women are excluded from male networks, or the 'informal brotherhood' in which experiences are exchanged, competence built up, and the formal code elaborated,' [cit.omit.], they are not only marginal but invisible when important professional decisions such as selection for promotion, tenure, research grants, co-editorships, summer teaching, and departmental privileges are considered [cit.omit.]. If women are denied access to established male networks (even if they have formed their own), they most likely will remain outside the power centers of their professions. Moreover, if women and men operate in different arenas, gender-role stereotypes will stand unchallenged."

DEBRA R. KAUFMAN AND BARBARA L. RICHARDSON, ACHIEVEMENT AND WOMEN: CHALLENGING THE ASSUMPTIONS (Free Press, MacMillan Publishing Company, New York 1982), p. 103.

## II. ARGUMENT

A. Gender Based Discrimination is Identified as a State Problem.

1. Passage of the State Equal Rights Amendment:

On November 7, 1972, an amendment to the Washington State Constitution was approved declaring that: "Equality of



rights and responsibility under the law shall not be denied or abridged on account of sex." Amendment 61, Article XXXI, § 1. The legislature was authorized to enforce the provisions of this article by appropriate legislation. Ibid., § 2.

2. Legislation: In 1973 the legislature amended the state law against discrimination to include the right to be free from gender based discrimination in employment, places of public accommodation, real estate, credit and insurance transactions. Laws of 1973, ch. 141, § 3. In 1985, the state human rights commission was given authority to process complaints of sex discrimination in places of public accommodation, and the statutory phrase "full enjoyment of" was defined to include,

"[T]he right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular . . . sex . . . to be treated as not welcome, accepted, desired, or solicited."

Laws of 1985, Ch. 203, § § 1 and 2. It is apparent that the state legislature found gender based discrimination to be a serious detriment to the general well being of the people of this state. It is also apparent that a public policy was adopted prohibiting gender based discrimination over a broad range of commercial and economic activity.

B. Definition of "Any Place of Public Resort, Accommodation, Assemblage, or Amusement"

1. Statutory Definition: RCW 49.60.040 defines the phrase "Any place of public resort, accommodation, assemblage, or amusement" to include (but not be limited to):

"[A]ny place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, . . . or where food or beverages of any kind are sold for consumption on the premises, . . . Provided, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; . . ."

As already noted above, Rotary clubs meet weekly in places of public accommodation, such as hotels, restaurants, hired halls and dining rooms. Nicoll, op.cit., p. 475. Whether or not Rotary is itself within the scope of this definition, its choice of meeting places is covered by the public accommodations sections of the law against discrimination.

2. Statutory Exemption:

If Rotary International is to successfully claim to be covered by the exemption in this definition for private clubs, it must establish that it has the characteristics of organizations which are by their nature distinctly private. What characteristics are shared in common by bona fide clubs, or places of accommodation, including fraternal organizations, which are by their nature "distinctly private"?

(a) Private Clubs are Relatively Small, Highly Selective, Intimate Groups Which Maintain Seclusion from Others: The U.S. Supreme Court dealt with the scope of constitutional protection for freedom of association in the context of a state (Minnesota) public accommodations law as it was applied to an organization which refused to admit women (U.S. Jaycees) in

Roberts v. U.S. Jaycees, 468 U.S. 609, 82 L.Ed.2d 462, 104 S.Ct. 3244 (1984). The Court held that the Jaycees lack those distinctive characteristics which would afford constitutional protection to its decision to exclude women. The Court did not attempt to identify every characteristic which might invoke the freedom of association protection, but those which were identified offer guidance in defining what kinds of groups ought to be considered "distinctly private" and therefore exempt from Washington State's public accommodations law:

"The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family -- . . . Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain

the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities -- such as a large business enterprise -- seems remote from the concerns giving rise to this constitutional protection. . . ." (Emphasis added)

82 L.Ed.2d 462, at 472-473.

Rotary International does not reflect these characteristics. It is an Illinois corporation with over a million members located in 152 countries. It has approximately 22 thousand local clubs some of which may be relatively small in size, but they are not highly selective in their membership procedures. Declaration of Jim Johnson, at pp. 1, 4, and 5 (paragraph 8). Their membership criteria are selective only in the sense that they look for high achievers (owners, managers, and professional people with a good reputation). They have a membership turnover of approximately 15 percent each year, and the local Club's Board of Directors has never



disapproved a member's nominee for membership. Declaration of Jim Johnson, at p. 5. They do not seek seclusion from others, in fact, they join in order to serve their communities and increase their business and professional contacts. Ibid, pp. 5 and 6.

(b) Private Club Activities Are Conducted in Buildings or Facilities Open Only To Members and Their Guests: A significant characteristic of fraternal organizations and other clubs which are characterized by their distinctively private nature is an exclusive meeting place, sometimes a single building but at other times a larger facility, such as a golf or country club.<sup>1</sup> The U.S. Supreme Court took special note of this characteristic in determining that a Moose Lodge was a private club in Moose Lodge No. 17 v. Irvis, 407 U.S. 163, 32 L.Ed.2d 627, 92 S.Ct. 1965 (1972):

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<sup>1</sup> In McFadden v. Elma Country Club, 26 Wn.App. 195, 613 P.2d 146 (1980), a Washington State Court of Appeals recognized that the country club was private but held that the private club exemption in RCW 49.60.040 did not apply to a real estate transaction.

"Moose Lodge is a private club in the ordinary meaning of that term. It is a local chapter of a national fraternal organization having well-defined requirements for membership. It conducts all of its activities in a building that is owned by it. It is not publicly funded. Only members and guests are permitted in any lodge of the order; one may become a guest only by invitation of a member or upon invitation of the house committee."

407 U.S. 163, at 171, 32 L.Ed.2d 627, at 636. A private club which has its own building, or other facility, where it can control admission and limit guests is in quite a different situation from a service club, such as Rotary, which meets in hotels, restaurants, and other places of public accommodation. Privacy, in the sense of intimacy and seclusion, is simply not possible in public places even though a particular room may temporarily be set aside for club meetings and luncheons. Those places which host Rotary meetings advertise this fact to the public by displaying the Rotary emblem in front. Nicholl, op.cit., p. 475.

(c) An Organization Which Offers Substantial Commercial/Economic Benefits Is Not Truly Private: The scope of the state



law against discrimination and its exemptions must be understood in light of its purposes. RCW 49.60.020. Its purpose with respect to places of public accommodation is to promote "full enjoyment of" the economic benefits these have to offer without regard to gender. RCW 49.60.030(1)(b). Commercial/economic benefits are intended to be covered by the law against discrimination in order that protected class persons, such as women, will not be deprived of these benefits because of their race, gender, etc. The U.S. Supreme Court made this observation in commenting upon the Minnesota public accommodations statute:

"A state enjoys broad authority to create rights of public access on behalf of its citizens. [cit.omit.] Like many states and municipalities, Minnesota has adopted a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct. [cit.omit.] This expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women."

[cit.omit.] Thus, in explaining its conclusion that the Haycees local chapters are 'place[s] of public accommodations' within the meaning of the Act, the Minnesota court noted the various commercial programs and benefits offered to members and stated that, '[l]eadership skills are'' goods,' '[and] business contacts and employment promotions are ''privileges'' and ''advantages'' . . . . '[cit.omit.] Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests."

82 L.Ed.2d 462, at 476-477.

The case at bar differs from Roberts v. U.S. Jaycees in two respects: (1) The Jaycees are a different organization from Rotary International offering somewhat different economic benefits; and (2) the Minnesota statute did not contain a private club exemption like that contained in RCW 49.60.040. The purposes of the Minnesota and Washington public accommodations statutes, however, are the same, and their scope should be determined in light of that purpose. The exemption in RCW 49.60.040 should not be interpreted so broadly as to undermine the purpose of providing equal access to economic benefits to both men and women.

### 3. Commercial/Economic Benefits of Rotary Membership Should Not be Denied to Women on the Basis of Gender

Since its inception, Rotary has been perceived as affording its members "both the regular pleasure of one another's company (in a social sense) and the regular advantages of one another's company (in a profitable sense)." Nicholl, op.cit., p. 34. Its founders decreed that no two members of a local club would have the same occupation so that there would be no competition among them. "On the other hand each member would have an obligation, wherever possible, to put business the way of a fellow-member rather than direct it to an outsider." Ibid. Today, the same commercial and economic interests continue to motivate new members to join:

"Prospective members are attracted to our Club because they want to serve their communities and because they recognize the value of augmenting their business and professional contacts. Many members share business opportunities and make business referrals to fellow Rotary members."

Declaration of Jim Johnson, pp. 5-6, paragraph 9.

A California Court of Appeals concluded that Rotary International is a business establishment within the meaning of the Unruh Civil Rights Act (Cal.Civ. Code § 51), which establishes a right to "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Rotary Club of Duarte v. Board of Directors, 224 Cal.Rptr. 213, at 216 (note 1); (according to the November 4, 1986 issue of the Seattle Post Intelligencer, at p. A-3, the U.S. Supreme Court has decided to review this California decision). This conclusion was based upon the substantial business benefits to be gained by belonging to Rotary. 224 Cal. Rptr. 213, at 224. The California court noted that:

"By limiting membership in local clubs to business and professional leaders in the community, International has in effect provided a forum which encourages business relations to grow and which enhances the commercial advantages of its members."

224 Cal. Rptr. 213, at 226. Although it does not contain a private club exemption like that in RCW 49.60.040, the Unruh Civil Rights Act has been interpreted as

not governing "'relationships which are truly private.'" Ibid. Those truly private relationships are "'continuous, personal, and social,'" and "'take place more or less outside public view.'" 224 Cal. Rptr. 213, at 226. The California court found with respect to Rotary that it is not, because of these commercial opportunities, a truly private organization. 224 Cal.Rptr. 213, at 227.

"Fraternal organizations" are those which are formed for mutual aid and benefit, but not for profit. BLACK'S LAW DICTIONARY, 5th Edition (1979), p. 594. Whether or not Rotary qualifies as a "fraternal organization" in the broadest sense of that term, it does not meet the test of being "by its nature distinctly private," as required by the private club exemption in RCW 49.60.040. The proviso exempts,

"[A]ny institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, . . ."

Because the term "fraternal organizations" follows "including", which in turn amplifies the meaning of the preceding phrase ending with the adjective "distinctly private," it must be understood to mean that



only "fraternal organizations" which are by their nature "distinctly private" are exempt from the public accommodations sections of the law against discrimination. The statutory definition of "Any place of public resort, accommodation, assemblage, or amusement" is intended to include bona fide clubs and fraternal organizations which are not by their nature "distinctly private." If this were not the case the purposes of the law could be thwarted by making every business association which wished to practice gender-based discrimination into a club or fraternal organization.

#### C. Conclusion of Argument

American women have made significant gains in achieving positions of leadership and responsibility in business management and the professions, especially within the last 20 years. It is both deplorable and ironic that a world-wide organization which was founded in United States over 80 years ago to provide an opportunity for leaders in the business and professional communities to work together for community betterment, as well as their own personal gain, has not seen fit to recognize their own potential importance in opening up

opportunities for full participation of women in the economic life of the communities they seek to serve. By excluding women from membership, Rotary International has caused: 1. Loss of opportunity for business and professional women to make personal contacts that would enhance their status and income; 2. Loss of the advantage of an informal network of contacts with business and professional leaders who have considerable knowledge and experience to share; 3. Loss of recognition for achievement in one's business or profession which membership in Rotary reflects, but which Rotary International denies to women regardless of their level of achievement.

The Washington State law against discrimination is intended to provide equality of access to economic and commercial benefits and prohibit discrimination in this regard based upon gender. The law is not intended to interfere with the choice of members in clubs which are by their nature distinctly private. Rotary International, however, does not exhibit the characteristics of a truly private club, and therefore it should be subject to the public accommodations provisions of



state law against discrimination, Chapter  
49.60 RCW.

Respectfully submitted this 10th day  
of November, 1986.

KENNETH O. EIKENBERRY  
Attorney General

/s/

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MARY M. TENNYSON  
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MS: PB-55  
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/s/

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1212 Dexter Horton Bldg.  
Seattle, WA 98104  
(206) 464-7045

ROTARY INTERNATIONAL  
John A. Henry  
Governor, District 503  
1986-1987  
P.O. Box 7026  
Seattle, WA 98133  
206/542-3138

October 2, 1986.

M.A.T. Caparas, President  
Rotary International  
1600 Ridge Avenue  
Evanston, Illinois 60201

Dear Mr. President:

I resisted the urge to write you following my return to Seattle from visiting the Alaska/Yukon Territory clubs because I am obviously aware of the press of massive correspondence. In view of the fact that I have now been served as the District Governor in a lawsuit requiring Rotary International's appearance and defense in the United States District Court here in Seattle for October 3, 1986, it causes me to put aside my reluctance to bother you.

Throughout my trip to the clubs in Alaska, I was met almost inevitably by questions regarding the Duarte case and, ultimately, a question about what can be done to resolve this issue. Most Alaska clubs and

most of the smaller clubs in King County are strongly in favor of the admission of women, with national option. No one that I have talked to has any interest in forcing countries to follow suit. I recently discussed this issue in some length with Past District Governor Bob Ladd who was our representative at the recent Council on Legislation. Bob was extremely disappointed that he was not allowed to speak in favor of the admission of women, but was cut off by a stampede to terminate debate. He tells me that a French delegate was able to stampede the council by his remarks. Bob also said that these are the same remarks that the same man delivered three years before. I was also told by Bob that every international president since James Bomar has, to one degree or another, been in favor of the admission of women. This rather surprised me and at the same time gave me some serious concerns. If that has been the case, then it has certainly been kept under wraps by your predecessors. I know your position and feel that if your predecessors had spoken as eloquently or as strongly as you have in the past on this issue, that this would be behind us. We are now faced with

a serious problem of being publicly dragged into the 20th century. This creates an impression in this country that is contrary to the feeling of most American Rotarians. Our district conferences, which were held in Anchorage in May, voted after reasoned debate and discussion 8 to 1 to admit women on the local option basis. That means that about 47 clubs voted in favor and 6 or 7 against. We're going to have to resolve this problem quickly and it requires innovative thinking on your part and the director's part. Perhaps the solution lies in the current lawsuit pending here in Seattle. The Board can vote to direct Rotary International's counsel to enter into an agreed order restraining Rotary International from lifting International Rotary Club of Seattle's charter. This would then be

announced as an order that Rotary International would consider binding upon itself in the United States. It's only a thought.

\* \* \*

Sincerely,

/s/

JOHN A. HENRY

JAH:jh

ROTARY INTERNATIONAL  
DISTRICT 503 CONFERENCE  
May 15-18, 1986

District Resolution 86-8

WHEREAS, the international Rotary movement has traditionally attracted to its membership the leading members of the business community in each locale where the movement is active; and

WHEREAS, profound economic and social changes in the United States and elsewhere have over the past twenty years significantly altered the former predominantly male complexion of the vast majority of business communities where Rotary is active; and

WHEREAS, the Rotary movement needs to attract the most talented, motivated and influential business people to its ranks to insure that Rotary does effectively meet its goals of community, vocational and international service;

NOW, THEREFORE, BE IT RESOLVED Rotary International amend its Constitution and

By-Laws to allow women members on a club basis.

Motion made, seconded and passed.

May 17, 1986, Anchorage, Alaska, U.S.A.

/s/

Edgar S. Philleo, Chairman  
1986 District 503 Conference  
Resolution Committee

/s/

Roy W. Kennelly, District 503  
Secretary, 1985-86

/s/

William R. Wood, District  
Governor, 1985-86, District  
503, Rotary International



SITKA ROTARY CLUB  
P.O. Box 1967  
Sitka, Alaska 99835

Resolution of the Members of  
Sitka Rotary Club Regarding the  
Admittance of Women into Rotary

Whereas Sitka Rotary Club was one of  
twenty-three clubs sponsoring a change in  
the constitution and bylaws to allow the  
admission of women into Rotary,

and

Whereas the 1986 Council on Legislation  
rejected such change,

and

Whereas Sitka Rotary Club voted to re-  
submit this issue to the next Council on  
Legislation,

and

Whereas District 503 voted overwhelmingly  
at its 1986 district convention to sponsor  
the Sitka Rotary Club's proposed change in  
the constitution and bylaws that would  
allow women to join Rotary,

and

Whereas the Court found in the Duarte de-  
cision that the prohibition of women vio-  
lated California law,

and

Whereas we believe it is self-evident that  
the prohibition of women does not indeed

meet Rotary's own four way test as was pointed out in the Duarte decision,

and

Whereas Sitka Rotary Club wholeheartedly supports Seattle International Club's efforts to obtain a similar court decision in Washington,

and

Whereas it is the consensus that Alaska's public accommodation laws would not support a successful legal challenge against the prohibition of women in Rotary,

and

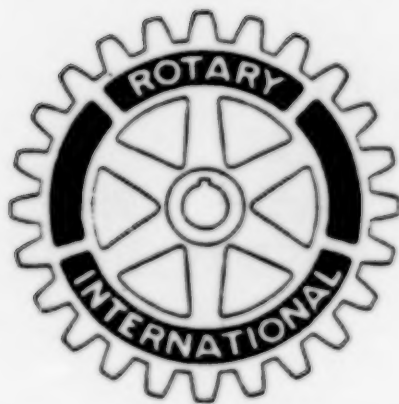
Whereas Sitka Rotary Club has neither the desire to lose its charter nor the resources to defend against such action by Rotary International,

Therefore,

Be it resolved that Sitka Rotary Club will support all legal challenges, both internal and external, to the prohibition of women in Rotary until this inconsistent position has been changed.

/s/

James L. Lansberry, President  
Sitka Rotary Club



# **WHAT'S IN IT FOR ME**

**ROTARY CLUB OF BOSTON  
428 BOSTON PARK PLAZA HOTEL  
BOSTON, MASSACHUSETTS 02117**

### "A PROFILE OF SUCCESS"

- . . . . You're an achiever . . . . you've made your mark on the Boston Business Community
- . . . . You enjoy involvement . . . . you're an "action" person!
- . . . . You enjoy meeting and identifying with other successful professionals like yourself.
- . . . . You know that developing a network of business contracts could be valuable in terms of professional development
- . . . . You get satisfaction from helping others

### IF THIS IS YOUR PROFILE . . . .

### YOUR PROFILE SHOULD INCLUDE BOSTON

### ROTARY



**EXCITEMENT**

25

THE TWENTY-FIFTH ANNUAL  
CONVENTION  
PLATE BREAKFAST

**GREATER  
BOSTON  
'86**

**LIFESTYLES**

## ROTARY CLUB OF BOSTON FACT SHEET

**WHEN:** Meets every Wednesday at 12:10 sharp for lunch.  
(attendance of at least 60% is required for continuing membership)

**WHERE:** Boston Park Plaza Hotel.

**WHY:** Our members join and participate in personal development by way of growth, outstanding speakers, opportunity to network with other influential community leaders and business professionals.

**WHAT:** Over 200 members highly active in the Boston business community.

**FOUNDED:** 1909 — (Seventh oldest Rotary Club in the world).

**OFFICE:** Rotary Club of Boston  
428 Boston Park Plaza Hotel  
Boston, MA 02117

**TELEPHONE:** (617) 426-7133

**EXECUTIVE  
DIRECTOR:** Richard J. Kelley

# The HUB

*A sampling of just a few of our outstanding luncheon speakers*

Charles Fivris  
Chairman Federal  
Communication Commission

John Nolan, President  
Massachusetts College Art

Philip Sullivan  
Postmaster - Boston

Honorable John Volpe  
Gov. Ambassador

Jack Williams  
WBZ-TV News - 4

Dr. Jean Mayer, Tufts Univ.

Joseph Barresi, Inspector Gen.  
Commonwealth of MA

Katherine Fanning, Editor  
Christian Science Monitor

John Coleman  
V.P. New England  
Telephone Company

John LaWare  
Shawmut Bank of Boston

James Sullivan  
President of Greater  
Boston Chamber of Commerce

Hon. John Lehman, Jr.  
Secretary of the Navy

William Douce, CEO  
Philips Petroleum Co.

Dick Albert, WCVB-TV - 5

Robin Young, WNEV-TV - 7

Fred Salvucci, Secretary  
Transportation

## YOU CAN MAKE THINGS HAPPEN

There are three major things the Rotary Club of Boston helps make happen:

1. Support for deserving college and post-college level students around the world, including:
  - Our own grants and loans to local students who need them (last year this amounted to \$32,000 for students).
  - Screening, recommending and supporting local candidates for Rotary Foundation Scholarships - an international effort that is five times as large as the Rhodes Scholarship Program (last year rotary granted \$21,915,000.00 to 1,154 students).
  - Continuing welcome, recognition and support to Rotary Scholars, and to children of Rotarians who are studying in Boston area colleges and universities.
2. Service to the community:
  - Organization and sponsorship of the Governor's Prayer Breakfast - which annually draws over 1,100 business and professional leaders from all over the city.
  - Both "hands on" and financial support for local projects, such as our current 3 year effort to help fight homelessness in Boston that has produced \$36,000 and over 1000 hours of Rotary volunteer effort, and the annual Christmas-time fund-raising that reaches 55-60 needy families each year.
  - Other support and assistance to those in need - whether locally or internationally.
3. Fellowship, new friendships, and outstanding weekly programs
  - Our attendance averages 65% of the Club's 200 members at luncheon each week, for speakers who in the past year have ranged from Paul Tsongas to Kenneth Olsen.
  - Programs are selected to stimulate and appeal to our diverse membership. This year's topics have covered everything from Northern Ireland to agribusiness to solid waste disposal to executive stress.

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### BOSTON ROTARIANS YOU MAY KNOW

Rev. Dr. Robert W. College, Vicar, Old North Church

"Rotary has provided me the opportunity to know men that I would not otherwise meet in my regular activities. Boston Rotary allows speakers and visitors from around the world, and breaking bread with such a varied group of achievers broadens one's horizons and deepens one's understandings. Rotary has been good for me."

Mr. George Walker, Former Postmaster General

Membership in Rotary can enhance the careers of executors and professionals, as it affords the opportunity to associate with many community leaders. Each individual has need to be concerned with humanitarian and youth programs and these are readily available in Rotary. This unique worldwide organization brings together people from many countries who share the same concerns and who welcome Rotarians to their countries and their clubs.

From personal experience, I highly recommend Rotary membership as a fulfilling experience which should be seriously considered.

Johnathan Peabody — Vice President Peabody Office Furniture Corp.

For over 16 years Rotary has enriched my life in many ways. Although there are a variety of ways a member may serve Rotary, I have chosen community services. This has involved over the years selecting needy families for gifts at Christmas serving meals at the Pine Street Inn, and chairing the committee to raise money for Boston's homeless community.

The weekly meetings are a welcome break from the pressures of business providing an opportunity to hear excellent speakers and make lasting friendships with fellow Rotarians.

I certainly consider my years as a Rotarian an important part of my life.

Clyde Brennan, Audit Partner, Deloitte Haskins & Sells

A city must have participation by its citizens to be vibrant. The corollary to this is that you must give to receive. Rotary fits these requirements. Businessmen can gather together to discuss the activities of the community and address its needs. There is no better way to fulfill your civic responsibilities.

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# JUST A SAMPLE OF THE DIVERSIFIED CLASSIFICATIONS OF OUR MEMBERS

Accounting Services	Immigration Service
Advertising	Insurance
Air Transportation	International Importers
Antique Clock & Watch Repair	International Marketing
Architecture	Investments
Association - Gas	Law Trial
Association - United Way	Occupational Safety
Association - U.S.O.	Oil Products - Commercial
Association - Y.M.C.A.	Photography
Association Youth Guidance	Physicians
Banking	Plumbing & Heating
Christianity	Public Relations
Community Services	Real Estate
Dentistry	Retailing - Beverage
Economist	Retailing - Computer
Education Junior College	Retailing - Drugs
Electric Light and Power service	Retailing - Florist
Engineering	Retailing - Food
Entertainment	Retailing - Jewelry
Foreign Government	Retailing - Office Furniture
Funeral Service	Stationary Commercial
Furniture Moving and Storage	Stock Broker Communications
Government - State	Travel Service
Heating - Commercial & Industrial	Vehicle Sales/rental
Hospitals - Chronic	Waste Service
Hotel	Wholesale - Fish

## YOU'LL BE PART OF A BIG OUTFIT

The Rotary Club of Boston, founded 75 years ago, the seventh oldest club in Rotary International, an organization that now numbers 21,753 clubs in 159 countries, with 1,000,000 members.

Our members are welcomed at Rotary Clubs all over the United States and the world -- and we regularly take advantage of this. Boston Rotarians have "made up" attendance this year in places ranging from Singapore to Sarasota, and we have each week welcomed guests from cities that range from Ankara, Turkey to Adelaide, Australia. (We average about 15 visitors from out of town each week -- a continuing stream of new friends and contacts from all over the world.)

You'd be surprised at the things your Rotary lapel button will lead you into:

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## YOU'LL BE IN GOOD COMPANY

Here's a sample of the many organizations who have members in the Rotary Club of Boston:

American Automobile Association	John Hancock Mutual Life Assurance Co.
Bank of Boston	Law Firms
Bank of New England	Looms, Sayles & Co.
BayBank of Boston	Liberty Mutual Insurance Company
B.L. Wakepeace	Massachusetts General Hospital
Boston Athletic Association	Merchants Cooperative Bank
Boston Edison Company	National Conference of Christians & Jews
Burdett School	New England Institute of Applied Arts and Sciences
Carey & Hayes Moving	New England Mutual Life Assurance Co.
Chamberlaine Junior College	Newsome and Company
C.J. Mann Corporation	Physicians
Coca Cola Bottling Company	Price Waterhouse
Cole-Henue	Big Carlton
Commonwealth of Massachusetts	R.M. Bradley
Digital Equipment Corporation	Robie Enterprises
D.Wm. Quinn Florist	Salvation Army
E.B. Hoan Company	Sciences
Fisher Junior College	Shawmut Bank
Four Seasons Hotel	State Street Bank and Trust Co.
Greater Boston Chamber of Commerce	The First Church of Christ Scientist
Greater Boston Visitor Convention Bureau	The Old North Church
Greater Boston Y.M.C.A.	United Way of Massachusetts Bay
GSA Corporation	USO Council
Japan Air Lines	
Jewish Memorial Hospital	

THERE'S PLENTY IN IT FOR YOU

YOU CAN HAVE ALL THIS...THROUGH  
BOSTON ROTARY

1. I would like to nominate Mr.  
Sergeant during so, I wish to ascertain whether or not it appears to the Committee that he is eligible for proposal  
If so, please mail me a Membership Application Blank to be filled out and returned to your Committee
2. The nominee is not a member of a similar service club
3. Proposal filled by Candidate
4. Full Name \_\_\_\_\_
5. Business Address \_\_\_\_\_  
Phone \_\_\_\_\_
6. Classification or Description of Business \_\_\_\_\_

As an example, the average cost savings is 60% of the savings in the previous year.

2

Figure 2

"A "conversation" with M.A.T.,"  
remarks of M.A.T. Caparas,

REPORT OF THE PROCEEDINGS OF THE  
ROTARY INTERNATIONAL ZONE I & VII  
INSTITUTE HELD ON OCTOBER 4, 1985  
IN DENVER, COLORADO

\* \* \*

. . . As a married man I am a family man. In a practice, for meeting the press, a lady reporter asked me, "Mr. President, how do you feel about women in Rotary personally?" And I said, "I'm the father of two daughters. I do not want them to be discriminated against." She did not pursue the question, although the answer was not really responsive. But it does say what I feel. I can explain to my daughters why women are not in Rotary. And I say, "You know Rotary started in 1905. At that time there was no such thing as professional and business specialists." There were "business men" not "business specialists." It was not fashionable to say "chairperson." It was believed that "mankind" included "human-kind." And therefore, for those who drafted the Constitution of our organization, Rotary, they just talked of males in the course of time, as they say "You've



come a long way, baby." But, the document has remained the same because it needs, just like the U.S. Constitution, a 2/3s vote to change it.

We've tried repeatedly, to change it in the same way that they have tried repeatedly to change the discrimination against women in the U.S. Constitution. And, they have failed, so far. There is another complication in our own Constitution. Our organization is an international organization and it gets much more difficult to change it. There are differences in ways of life. For instance, there are so many different ways of life. The Korean way of life and the American way of life--in Korea, a Korean was saying the women walk behind their husbands and in the United States they walk all over them. The Korean said in Korea you won't get a laugh out of that because in Korea the women do walk over the backs. It is the truth.

I feel, personally, and I think it should be said because I will head your organization, I feel that injustice should not be permitted to exist. We should

strive against it. It is a form of injustice, that if permitted to continue without resistance, will breed the kind of discrimination that we take for granted. So much for women in Rotary.

\* \* \*



JAN 28 1987

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL; et al.,

*Appellants,*

—v.—

ROTARY CLUB OF DUARTE; et al.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEAL OF THE  
STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

**BRIEF OF THE KIWANIS CLUB OF RIDGEWOOD,  
INC. AND JULIE FLETCHER AS AMICI CURIAE  
IN SUPPORT OF APPELLEES, ROTARY  
CLUB OF DUARTE, et al.**

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January 1987

30PP



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### INTEREST OF THE AMICI CURIAE

The Kiwanis Club of Ridgewood, Inc., and Julie Fletcher, as Amici Curiae, support affirmance of the judgment of the Court of Appeal of the State of California, Second Appellate District 178 Cal. App. 3d 1035 (1986). The Kiwanis Club of Ridgewood, Inc. and Julie Fletcher are parties to an action presently pending in the United States Court of Appeals for the Third Circuit involving the admission of an otherwise qualified woman to a traditionally all-male service club (Kiwanis International v. Ridgewood Kiwanis Club and Julie Fletcher, Docket Nos. 86-5199 and 86-5278, reversing 627 F.Supp. 1381). Kiwanis International has already filed an Amicus Brief in support of the

jurisdictional statement of Rotary International in this case.

The Kiwanis Club of Ridgewood, Inc. (hereinafter "Ridgewood") is a chartered member of Kiwanis International (hereinafter "International"). International is the parent organization of approximately 8,200 local Kiwanis Clubs with membership of about 330,000 throughout the world.

Membership in Kiwanis Clubs is limited to men pursuant to the Kiwanis Constitution and By-laws which the local clubs agree to adopt when accepting their charters.

On August 8, 1984, Julie Fletcher (hereinafter "Fletcher"), a female business and residential art consultant, was invited to become a member of Ridgewood. Fletcher met all of the

criteria of membership with the exception of her sex.

Thereafter, International advised Ridgewood that unless Fletcher's membership was terminated, Ridgewood's "license" to use the Kiwanis service marks would summarily be revoked.

On September 6, 1985, Ridgewood and Fletcher filed suit in the Superior Court of New Jersey, Chancery Division, Bergen County, against International alleging violation by International of the New Jersey Law against Discrimination N.J.S.A. 10:5-1, et seq. and Article I, Section I of the New Jersey Constitution, and seeking an injunction against the revocation of Ridgewood's license to use the Kiwanis service marks.

International filed suit in the United States District Court for the District of New Jersey alleging that Ridgewood, by admitting a woman member in violation of Kiwanis membership policy, had forfeited the right to use the Kiwanis service marks and was, by continuing to use them, infringing on International's marks under the Lanham Act, 15 U.S.C., Section 1051, et seq.

On September 12, 1985, International filed a Petition for removal of the state court action to the federal district court, based on diversity, where it was consolidated with International's original Complaint.

Ridgewood filed an Answer and Counterclaim seeking affirmative relief pursuant to 42 U.S.C., Section

1983, the U.S. Constitution, the New Jersey Law against Discrimination, N.J.S.A. 10:5-1 et seq., the New Jersey Constitution and the common law.

On November 18 and 19, 1985, the matter was tried before the Honorable H. Lee Sarokin held.

On March 4, 1986, the District Court entered a Final Judgment enjoining International from enforcing its sexually discriminatory membership policies in its licensing agreement with Ridgewood.

International filed Notices of Appeal from both the Final Judgment and subsequent Order awarding counsel fees to Ridgewood.

Thereafter, on December 3, 1986, the Third Circuit Court of Appeals



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reversed the decision of Judge Sarokin. Although Judge Sarokin reached both the Constitutional and statutory issues, the Third Circuit did not reach the Constitutional issues but based its decision solely on a construction of the New Jersey Law against Discrimination, holding that Ridgewood was not a "public accommodation" under the statute.

On December 17, 1986 Ridgewood and Fletcher filed a Petition For a Rehearing and Rehearing on Banc. The State of New Jersey, Division on Civil Rights, the entity charged by the New Jersey Law against Discrimination with the responsibility to interpret and enforce the New Jersey Law against Discrimination, filed an Amicus Curiae Brief in Support of Ridgewood

and Fletcher's Petition for Rehearing, asserting that the Court erred in its construction of New Jersey law. The Petition for Rehearing is currently pending.

Should the Third Circuit Court of Appeals decide to review its decision, and should it adopt the position of Ridgewood, Fletcher and the State of New Jersey, Division on Civil Rights, that the Kiwanis Club is a public accommodation under the New Jersey Law Against Discrimination, the Third Circuit would then be forced to reach the Constitutional issues of freedom of intimate and expressive association which were addressed by Judge Sarokin and briefed by the parties on the appeal. Ridgewood and Fletcher, therefore, are vitally interested in

the outcome of the within case as it may have a direct bearing on the ultimate decision in their case.

ARGUMENT

- I. A LARGE SERVICE CLUB SUCH AS ROTARY OR KIWANIS IS NOT ENTITLED TO EXCLUDE OTHERWISE QUALIFIED WOMEN BASED UPON AN ASSERTED RIGHT TO FREEDOM OF INTIMATE ASSOCIATION.
- 

In its opinion in Roberts v. United States Jaycees 82 L. Ed. 2d 462 (1984), 468 U.S. 609, 104 S. Ct. 3244 (1984), this Court reviewed at length and in detail the case law developing the right to freedom of intimate association. This Court stated Id. at 82 L. Ed. 2d 472, that the types of personal affiliations deserving of Constitutional protections are those that attend the creation and sustenance of a family - marriage eq. Zablocki v. Redhail 434 U.S. 374, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978); childbirth, eq. Carey v. Population

Services, Int'l 431 U.S. 678, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977); the raising and education of children, eq. Smith v. Organization of Foster Families 431 U.S. 816, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977); and cohabitation with one's relatives, eq. Moore v. City of East Cleveland 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 2932 (1977).

The Court in Roberts continued, "family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life." (emphasis added) Id. at 472. Beyond this, the Court sought to

determine whether other associations, less personal than those enumerated above, might yet be close enough to be deserving of First Amendment protection.

The Court in Roberts analyzed the United States Jaycees practices and procedures to determine whether or not this was a truly 'intimate association'. In its analysis, the Court looked to such factors as size, purpose, policies, selectivity, and congeniality and found the Jaycees not entitled to protection.

The local chapters, said this Court, are ". . . large and basically unselective . . . apart from age and sex, neither the national organization nor the local chapters employs any criteria for judging applicants for

membership . . . . In fact, a local officer testified that he could recall no instance in which an applicant had been denied membership on any basis other than age or sex . . . . Furthermore, despite their inability to vote, hold office or receive certain awards, women affiliated with Jaycees attend various meetings, participate in selected projects, and engage in many of the organization's social functions . . . . Indeed, numerous non-members of both genders regularly participate in a substantial portion of activities . . . including many of the organization's various community programs, award ceremonies and recruitment meetings." Id. at 473 to 474.



In the case at hand, the California Court of Appeal similarly found that membership in Rotary was "far from continuous, personal and social." The California Court of Appeal pointed out that the local Rotary Clubs are formed only upon the approval of the International organization and that all members must abide by the rules set forth by International in its Consitution and By-Laws, or risk revocation of its charter. The California Court also found that the local clubs performed community services which took place in "public view". The local clubs also had high turnover rates. Rotary Club of Duarte v. Board of Directors, 224 Cal. Rptr. 213, 227 (Cal. App. 2 Dist. 1986). The California Court held that

while Rotary membership was somewhat selective, "the immense size of International and the number of Rotarians throughout the world is hardly indicative of an intimate relationship." Id. at 230. This is a crucial point and one made by Judge Sarokin as well in his decision in the Kiwanis case - it is the size of International which must be given prime consideration, not the size of a particular local club. In the within case, as well as the Kiwanis case, the local club invited the woman member(s) to join and it was the International - a group, in the case of Rotary, with nearly a million members, which interfered with the local's choice to associate with women on an equal basis.

In this regard, Judge Sarokin stated,

"throughout the hearing in this matter, Kiwanis [International] continually adverted to facts which suggested that its membership is highly selective and that members participate in the organization's activities for reasons of camaraderie . . . . A consideration of all the relevant aspects of the Kiwanis organization, however, shifts the balance in quite the opposite direction. As noted above, the organization in its entirety has 8,200 locals and a world wide membership of 313,000, and Kiwanis Clubs in North America experience a 75% attrition rate in the first year for new members. When viewed in such broad range, these characteristics fit ill with the concept of intimacy that the Court clearly intended to emphasize in Roberts. Furthermore, testimony established repeatedly that the primary function of Kiwanis is not to promote camaraderie among its members, but rather to perform charitable service to the community. While creating a sense of camaraderie is certainly a secondary goal of Kiwanis, and while that goal is as laudable and significant in that organization as is it in any communal effort that individuals chose to undertake, it is not the sine qua non of Kiwanis' existence. In any event, the ex-president of the Ridgewood Club testified that neither the comradeship of that club's members nor the clubs

overall charitable goals would be adversely affected in any way by the admission of women. This testimony was reinforced by evidence which established that the formal objectives of Kiwanis are in no way sex-specific, and that in clubs throughout the country women are often present at meetings and participate closely with the male members in the organization's charitable activities. Indeed, the only activities from which women are apparently excluded are office-holding and participation in Kiwanis Clubs primary decision-making processes. In light of all these factors, the Court must conclude that Kiwanis lacks the distinctive indicia of intimate association that might afford Constitutional protection to its members' decision to exclude women." 627 F. Supp. 1381 (D.N.J. 1986)

It is clear, that except for certain differences in the written procedures for the selection of members (it would appear, on paper, that the admission procedures of Rotary and Kiwanis are more highly selective than those of the Jaycees, however, in practice, it does not appear that people are turned down for

membership on any basis other than sex) the fact is that Rotary, Jaycees and Kiwanis do not represent the types of associations traditionally afforded Constitutional protections - small groups having not only a community of thoughts, experiences and beliefs, but also involving the distinctly personal aspects of their members' lives. While there may be groups whose right to intimate association should be afforded the First Amendment protection, an enormous, diverse service club such as Rotary is not such a group. 1/

---

1/ In Roberts v. United States Jaycees, supra at 479, this Court referred to a statement in the Minnesota Supreme Court's Decision in the same case, United States Jaycees v. McClure, 305 N.W. 2d 764, 771 (1981), that Kiwanis is a private organization as contrasted with the

Jaycees. A closer look at the Minnesota Supreme Court's decision and the lower federal court decisions reflects that Kiwanis was not clearly distinguished from the Jaycees by the Minnesota Supreme Court.

The Minnesota Supreme Court at 771 stated simply, "we, therefore reject the national organization's suggestion that it be viewed analogously to private organization such as the Kiwanis International Organization." No further explanation is given. Clearly, it was the National Jaycees, not the Minnesota Supreme Court, which suggested that Kiwanis was more "private" than the Jaycees.

The Minnesota Supreme Court Decision was followed by the Decision of the United States District Court in United States Jaycees v. McClure, 534 F. Supp. 766 (1982). With regard to Kiwanis that Court stated, "there is insufficient evidence in the record pertaining to the activities of these groups to allow any determination whether the statute would apply to them. . . ." Id. at 773.

A year later, the Eighth Circuit Court of Appeals reversed the District Court in United States Jaycees v. McClure 709 F.2d 1560 (1983). With reference to Kiwanis, the Court of Appeals harked back to the Minnesota Supreme Court Decision and said: "the opinion does not say what it is about the Kiwanis that makes it 'private'. . . . The record is hardly full as to the Kiwanis Club and its activities, but the information it does contain



seems rather to emphasize the similarities between the Kiwanis and the Jaycees then the difference. The Kiwanis Club has about 300,000 members nationwide, and about 7,750 local chapters, 1 Gale, Encyclopedia of Private Associations, supra, at 783 (16th Ed. 1981). It has as broad a range of activities as the Jaycees and competes for 'the same class of members,' except that the Kiwanis has no upper age limit."

The Court then quotes the Kiwanis membership requirements and states: "at the oral argument the State suggested that membership in the Kiwanis Club is less broadly available than membership in the Jaycees. The language quoted from the By-Laws of the Kiwanis Club fails to demonstrate this to our satisfaction."

The Court of Appeals comments regarding Kiwanis could as easily be applied to Rotary. It is clear that this Court's reference to Kiwanis in Roberts v. United States Jaycees, supra, was simply meant to illustrate the point that there might certainly be groups that were indeed so private that they would not be reached by the Minnesota statute, but that the Jaycees was not such a group.



**II. LARGE SERVICE CLUBS' RIGHTS TO  
FREEDOM OF EXPRESSIVE ASSOCIATION  
ARE NOT IMPERMISSIBLY AFFECTED BY  
THE APPLICATION OF STATUTES  
FURTHERING STATES' COMPELLING  
INTEREST IN ERADICATING SEX  
DISCRIMINATION.**

Once the issue of intimate association has been resolved with the finding that the Rotary Club is not that type of association invoking the Constitutional protections accorded marriage, childbirth and a similar associations, the Court must then determine whether or not Rotary members' right to expressive association has been infringed, and if so, whether such infringement is to an impermissible extent, by the Unruh Act (West's Ann Cal. Civ. Code Section 51) prohibiting discrimination on the

basis of sex by all "business establishments."

The freedom of expressive association is the freedom of each individual to engage in group effort, free from untoward interference by the State, to pursue various political, social, economic, educational, religious and cultural ends. Roberts v. United States Jaycees *supra* at 474.

The purposes and goals of Rotary do not include promulgation of the concept that women are somehow inferior or inadequate or unable to participate in making decisions. Service clubs are not like the Ku Klux Klan, which excludes Jews and Blacks because their purpose is to destroy them. Nor has it been shown that women's views of community service

differ from those of men such that the goals and activities of the service clubs would be affected. In fact, the Kiwanis women's auxiliary, the Kiwaniannes, is directly involved in Kiwanis service activities and fundraising projects. Women are also permitted to participate in Rotary functions.

Even if the association's members' rights were infringed, the infringement is necessary to advance the State's compelling interest in eradicating sex discrimination.

This Court, in Roberts v. United States Jaycees Id. at 474 to 475 stated,

"by requiring the Jaycees to admit woman as full voting members, the Minnesota Act works an infringement . . . there can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the

group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together . . . the right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling State interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedom.... We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."

This Court further found that the Jaycees failed to demonstrate that the Minnesota Act "imposed any serious burdens on male members' freedom of expressive association." Id. at 477.

Judge Sarokin came to the same conclusion in Kiwanis International v. Ridgewood Kiwanis Club and Julie Fletcher supra, finding that the testimony had repeatedly established

that women's full participation in Kiwanis Clubs would do little to inhibit male members freedom to express themselves as they currently do, since women are already permitted to participate in almost all of the activities in which such expression may occur. The California Court of Appeal was in accord as regards Rotary, essentially finding that Rotary members freedom of expressive association was entitled to no greater protection than that of the Jaycees. Rotary Club of Duarte v. Board of Directors supra at 231.

CONCLUSION

The Kiwanis Club of Ridgewood, Inc., and Julie Fletcher, respectfully urge this Court to affirm the Decision of the California Second District Court of Appeals in the within case, by finding that Rotary's First Amendment rights to freedom of association have not been impermissibly infringed upon by the California statute.

Respectfully submitted,

HIRSCH, NEWMAN, SIMPSON &  
BAER

By   
\_\_\_\_\_  
Marcia Kuttner Baer

Dated: January 26, 1987

No. 86-421

Supreme Court, U.S.  
FILED

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IN THE SUPREME COURT  
OF THE  
UNITED STATES

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,  
Appellants,  
v.  
ROTARY CLUB OF DUARTE, et al.,  
Appellees.

On Appeal From the Court of Appeal  
of the State of California  
Second Appellate District

BRIEF OF THE EMPLOYMENT LAW  
CENTER OF THE LEGAL AID SOCIETY OF SAN  
FRANCISCO AS AMICUS CURIAE IN SUPPORT  
OF APPELLEES ROTARY CLUB OF DUARTE, ET AL.

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January 28, 1987





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No. 86-421

IN THE SUPREME COURT  
OF THE  
UNITED STATES

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OCTOBER TERM, 1986

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BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,  
Appellants,  
v.  
ROTARY CLUB OF DUARTE, et al.  
Appellees.

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On Appeal From the Court of Appeal  
of the State of California  
Second Appellate District

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BRIEF OF THE EMPLOYMENT LAW  
CENTER OF THE LEGAL AID SOCIETY  
OF SAN FRANCISCO IN SUPPORT OF  
APPELLEES ROTARY CLUB OF DUARTE, ET AL.

---

The Employment Law Center of The  
Legal Aid Society of San Francisco  
Respectfully Submits This Brief  
as Amicus Curiae in Support of  
Appellees, Rotary Club of Duarte, et al.

INTEREST OF AMICUS CURIAE

The Employment Law Center, the principal project of the Legal Aid Society of San Francisco, is nationally recognized



for its expertise regarding state and federal laws prohibiting employment discrimination. It has pioneered the employment field for over a decade. It focuses on legal problems of disadvantaged people as they seek to secure and retain employment and represents those who find opportunity denied them for reasons other than their ability to do the job.

This case presents the question of whether a state may prohibit sex discrimination in large, unselective organizations that sell leadership training, business contacts, and employment opportunities to their members. Such organizations provide extensive and important employment-related opportunities to members, and their continued exclusion of women presents a substantial impediment to the integration of women into the



workforce. As an organization concerned with securing full equality in employment opportunities for minorities and women, the Employment Law Center has a strong interest in this case, and respectfully submits this brief in support of the Rotary Club of Duarte.

#### SUMMARY OF ARGUMENT

I. This Court has already determined that large, unselective, business and civic organizations like the Jaycees and the Rotary can be required to admit women under state "public accommodations" acts. Roberts v. United States Jaycees, 468 U.S. 609 (1984). The facts of the case at bar fall squarely within the holding in Roberts, and therefore this case presents no substantial Federal question, and should be dismissed for lack of jurisdiction.





II. A. The fundamental freedom of intimate association protects highly personal relationships such as marriages and families. E.g., Griswold v. Connecticut, 381 U.S. 479 (1965). The First Amendment does not protect the interaction of business acquaintances brought together in a large civic and business organization. In Roberts, this Court held that such organizations are not sufficiently small, selective or exclusive to merit the extensive constitutional protection afforded to intimate family relationships. 468 U.S. at 621. That holding is fully applicable to the case at bar.

B. A non-intimate group's First Amendment freedom of association is limited to its expressive activity. Runyon v. McCrary, 427 U.S. 160, 176 (1976). Unlike Jaycees, Rotary's only expressive activity is its community



work, and therefore Rotary's freedom of association rights are limited to the protection of that expression.

III. States have a compelling interest in prohibiting sex discrimination in business organizations like Jaycees and Rotary that sell leadership programs, business contacts, and employment opportunities to members in exchange for dues. Roberts, 468 U.S. at 626.

IV. There is no significant infringement of expression unless there is a significant effect on the content of speech. Roberts, 468 U.S. at 627. In Roberts, this Court held that the admission of women would not significantly affect the content of Jaycees' speech, and that holding applies with equal force to Rotary. Members' preference for discrimination is not protected, Runyon, 427 U.S. at 170, and International's plea of international pressure is contradicted



by its willingness to face such pressure and admit Black members. Since the content of Rotary's speech would not be significantly affected by the admission of women, the state's prohibition of sex discrimination by Rotary is the least restrictive means of accomplishing its compelling interest.

VI. California courts have defined a "business establishment" under the Unruh Civil Rights Act as a public accommodation providing goods, services or facilities to patrons, Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal.3d 72, 79-80, 707 P.2d 212 (1985), or as an entity with "business-like attributes," which carries on business relationships within the stream of commerce. O'Connor v. Village Green Owners Association, 33 Cal.3d 790, 796, 662 P.2d 427 (1983). Both International and



Duarte sell goods and services to their patrons in exchange for dues, and both operate numerous Rotary-related enterprises, both are "business establishments" covered by the Act. Since the blanket exclusion of women does not serve well-documented safety or special facility concerns, International's conduct is precisely the arbitrary discrimination prohibited by the Act.

#### ARGUMENT

- I. THE COURT DOES NOT HAVE JURISDICTION OVER THIS CASE: SINCE THE FACTS FALL SQUARELY WITHIN ROBERTS, THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

This case poses the question of whether a state can constitutionally apply its public accommodations law to a large, international association that provides business connections and skills





for its members. Just two years ago this Court squarely addressed that precise question in Roberts v. United States Jaycees, 468 U.S. 609 (1984). In that case, the Court held that the application of the Minnesota Human Rights Act to Jaycees to compel the organization to admit women did not violate members' First Amendment freedom of association. Jaycees, a large, non-selective group of businessmen brought together to advance their business and professional interests while performing public works for the community, is remarkably similar to Rotary, also a large, non-selective group of businessmen brought together for similar purposes. Rotary, like Jaycees, is not sufficiently small, selective or exclusive to merit the protection of the fundamental freedom of intimate association accorded spouses and families. To the limited extent that Rotary engages in



protected expression, the compelling state interest recognized in Roberts outweighs the minimal infringement of Rotary's speech, just as it outweighed a greater infringement in Roberts. Because the two groups are strikingly alike, the case at bar is controlled by Roberts. Since this case raises no new situation or issue, there is no substantial Federal question, and, thus, no jurisdiction.

II. ROTARY HAS ONLY LIMITED FIRST AMENDMENT RIGHTS, WHICH DO NOT JUSTIFY THE ORGANIZATION'S DISCRIMINATION IN VIOLATION OF THE UNRUH ACT.

This court has recognized two types of freedom of association protected by the First Amendment. The first is generally referred to as freedom of intimate association, and protects marital and familial relationships. E.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Zablocki v. Redhail, 434 U.S.



374 (1978). The second, referred to as freedom of expressive association, includes association for the purpose of engaging in protected activity such as speech or religion. E.g., Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982); NAACP v. Button, 371 U.S. 415 (1963).

As an international association with member clubs that are not genuinely selective or exclusive, neither International nor Duarte possesses a fundamental right of freedom of intimate association. To the limited extent that Rotary at any level engages in any protected expression, its interest in freedom of expressive association is outweighed by the state's compelling interest in prohibiting discrimination in business establishments.

Since this case does not involve any fundamental rights, the application of





the Unruh Act, in order to pass constitutional muster, need only bear a rational relationship to a legitimate state interest. This test is clearly met.

- A. Rotary, Like Jaycees, Is Not Sufficiently Small, Selective Or Exclusive To Merit The Fundamental Freedom Of Intimate Association Accorded Spouses and Families.
- 

This Court has developed the doctrine of freedom of intimate association in cases involving the highly personal relationships found in marriages and families:

Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As



a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of liberty.

Roberts, 468 U.S. at 619-620.

Family relationships are so highly personal that the federal government must intervene in order to protect them from overly intrusive state regulation. Because of the unique nature of these relationships, this protection has been limited to families and surrogate families. See Griswold v. Connecticut, 381 U.S. 479 (1965) (right to make choices about procreation); Eisenstadt v. Baird, 405 U.S. 438 (1972) (same); Roe v. Wade, 410 U.S. 113 (1973) (same); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (same); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (same); Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Loving v.



Virginia, 388 U.S. 1 (1967) (same);  
Moore v. City of Cleveland, 431 U.S. 494  
(1977) (right to live with relatives);  
Smith v. Organization of Foster Families,  
431 U.S. 816 (1977) (right to raise and  
educate one's own children); Wisconsin v.  
Yoder, 406 U.S. 205 (1973) (same);  
Pierce v. Society of Sisters, 268 U.S.  
510 (1925) (same); Meyer v. Nebraska,  
262 U.S. 390 (1923) (same); Quilloin v.  
Walcott, 434 U.S. 246 (1978) (right to  
parent-child relationship); Stanley v.  
Illinois, 405 U.S. 645 (1972) (same).

Roberts indicates that even if the  
Court were to extend stringent constitu-  
tional protection to small, selective,  
and exclusive groups of intimate personal  
friends, this change would have no effect  
on large business and civic organizations  
like Rotary. In Roberts, this Court  
rejected Jaycees' claim of freedom of  
intimate association, holding that



Jaycees did not have the attributes necessary to enjoy a constitutionally protected right of intimate association. The Court relied on the fact that: (1) Far from being small, Jaycees had approximately 295,000 members in 7,400 local chapters. Roberts, 468 U.S. at 613. (2) The organization had no objective criteria for admission other than age and sex, and rarely rejected an applicant for any other reason. Roberts, 468 U.S. at 621. (3) Jaycees allowed, and, in fact, encouraged women and other non-members to participate in many of the events most central to the organization's recited purpose, including community programs and events. Id.

Thus, Jaycees failed to meet the narrowly drawn requirements of smallness, selectivity or exclusivity that are necessary to establish a fundamental constitutional right of freedom of intimate





association. Rotary has failed to distinguish itself from Jaycees, and so this case falls precisely within this Court's holding in Roberts.

1. Rotary Is Larger Than The Jaycees.

Rotary is actually a much larger organization than the Jaycees, with almost 1,000,000 members in 20,000 local clubs. Appellants' Appendix to Jurisdictional Statement (J.S.App.) F2. Although some local clubs are substantially smaller than the Minnesota Jaycees clubs before the Court in Roberts, many are larger, with some boasting as many as 900 members. J.S.App.G15.

In addition, it is the size of the organization claiming the freedom of intimate association that is both relevant and telling here. Rotary characterizes itself as a "worldwide



fellowship," J.S.App.G44, and emphasizes creating international connections and fostering international understanding. A.60. Members are required to attend a Rotary meeting each week, but they need not attend the meeting of the local club to which they belong (and where, to the extent that it exists at all, intimacy in interpersonal relationships might presumably be found). J.S.App.G23. Rather, members are encouraged to attend meetings of other clubs, as a way to foster international understanding. J.S.App.G24. This fact belies the International's claim that the local clubs and meeting requirements reflect and facilitate the bonds of intimacy that can develop from smallness and that merit extensive constitutional protection.

Far from seeking to be small and intimate, Rotary is constantly seeking to expand and grow. An important Rotary



goal is to make local clubs and International as large as possible. A.62;

J.S.App.G33. International urges all local Rotary clubs to engage in active and continuous recruitment of new members by inviting friends and acquaintances to attend meetings and by obtaining as much positive news coverage as possible.

A.70-73, 88-89. Thus, an important and acknowledged goal of Rotary is to spread the "Rotary ideal" throughout the community and hence persuade as many influential businessmen as possible to join the organization. A.70; J.S.App.G18. Prospective new clubs must have at least twenty members to become members of International, and clubs that fall below that number are subjects of considerable concern on the part of regional and international Rotary leaders.

J.S.App.G21, G60.





2. Rotary Is No More  
Selective Than Jaycees.

Not only is Rotary intent on not being or remaining small, it also does not protect its allegedly intimate friendships by being highly selective in admitting new members. Although Rotary does conduct a minimal inquiry into a potential member's background, the inquiry is not the kind of selectivity this Court has consistently looked for in intimate association cases. Individual members do not evaluate the applicant to determine if he and they are personally compatible as intimate friends. The applicant is only reviewed by a Board of Directors to determine his reputation and standing in the community. Once approved by the Board, the applicant's name is submitted to the membership. The membership has ten days to object to the applicant's admission. If no one objects, the



applicant is automatically admitted to the local club. Appellants' Brief at 7-8. If a member does object to an applicant, the Board must vote again to approve admission. Appellants' Brief at 8.

While this system ensures that the club will not admit someone with whom a member already knows he does not get along, it does nothing to ensure that applicants whom some members do not know will be personally compatible with the membership. This system reveals the true criteria of Rotary: not personal compatibility, but business and civic suitability. The purpose of Rotary club is not to foster a community of compatible people forming deep and intimate relationships, but rather to bring together influential and upstanding members of the community. Just as in Roberts, therefore, Rotary's selection process fails to



establish the kind or the degree of selectivity that indicates an intimate association.

3. Rotary, Like Jaycees, Is Non-Exclusive.

Finally, as in Roberts, Rotary does not exclude non-members from its affairs or its projects. Just the opposite: International encourages the womens' organizations unofficially affiliated with it to join it in local clubs' performance of their civic duties. A.44, 69. In addition, Rotary urges members to bring to local meetings non-members who might be interested in joining the organization. A.66. Rotary clubs may hold joint meetings with other service clubs. A.39. Members can bring students to meetings on a regular basis J.S.App.66-67. International urges local clubs to organize affiliated student groups, made up of both men and women.



J.S.App.G30. Members are encouraged to involve non-members in study groups addressing international problems.

A.60. In short, International encourages members to involve non-members in many different aspects of the organization's activities, in order to give Rotary a good name, to foster its ideals, and to identify potential new members. This lack of exclusivity in the conduct of events and projects is at the heart of Rotary ideal and mirrors the situation posed in Roberts.

Rotary is virtually indistinguishable from the Jaycees in all relevant respects. This Court has already decided in Roberts that clubs such as the Jaycees are not characterized by the highly personal relationships that merit the constitutional protection of the First Amendment Freedom of Association. That





case is controlling and governs the case at bar.

B. Rotary Only Engages In Limited Expressive Activity, And So Is Only Entitled To Limited First Amendment Protection.

A non-intimate group's fundamental freedom of association is limited to its expressive activity. Runyon v. McCrary, 427 U.S. 160, 176 (1976). This fundamental right springs essentially from the freedom of expression. Therefore, to the extent that a non-intimate association exercises its freedom of speech, any infringement of its right to associate that affects that exercise is subject to strict scrutiny. If the infringement serves a compelling state interest and is achieved through the least restrictive means, it may be justified. E.g., Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam); Democratic Party v. Wisconsin, 450 U.S. 107, 124 (1981).



Rotary engages in even less expressive activity than the Jaycees did. Unlike Jaycees, Rotary does not engage in extensive political speech; in fact, it has a specific policy against such speech. A.59. It does, like Jaycees, engage in civic activities that merit First Amendment constitutional protection. Rotary's freedom of association is thus implicated only insofar as the Unruh Act infringes these expressive activities.

III. CALIFORNIA HAS A COMPELLING STATE INTEREST IN PROHIBITING SEX DISCRIMINATION BY BUSINESS ORGANIZATIONS LIKE ROTARY.

The state has a compelling interest in prohibiting gender discrimination in business establishments. This Court has held:

[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to



their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic and cultural life.  
(citations)

Roberts, 468 U.S. at 625.

As this Court held in Roberts, public accommodations laws that reach "public, quasi-commercial conduct" reflect "a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women. (citations omitted)" 468 U.S. at 626. Businessmen's organizations designed to foster business relationships and civic and business involvement are important tools to that advancement. The leadership skills, business contacts and employment opportunities





provided in such organizations are clearly "goods, privileges, and advantages" to which the state has a compelling interest in ensuring equal access for women. Id. Organizations like Jaycees and Rotary are instrumental in providing these goods, privileges and advantages, both directly through programs and materials provided for members, and indirectly by creating a setting and an atmosphere in which members of the business community can meet, interact, and "network." See, e.g., Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 Harvard Civil Rights - Civil Liberties Law Review 321, 325-334 (1983).

In Roberts, this Court held that in applying its public accommodation law to Jaycees, Minnesota had a compelling interest in eradicating sex



discrimination in the provision of goods, services and the leadership programs, business contacts and employment opportunities that groups such as Jaycees provide. 468 U.S. at 626. An identical interest exists here.

Large civic and business groups like Jaycees and Rotary sell business and employment opportunities, goods, and services to their membership in exchange for membership dues. In Rotary, these benefits include Rotary publications and periodicals, "business relation conferences" and other vocational programs that teach management skills, and most important, the opportunity and facilities to make business and employment contacts.

Although Rotary guidelines allegedly prohibit members using Rotary for commercial advantage, the evidence belies this. Membership selection is categorized by profession. A.36-37.



Retired people cannot be full members.

J.S.App.G56. The organization sponsors business-related programs and seminars to teach "management techniques that help improve his own business and professional skills." A.14-21. Clubs are urged to create committees to give "business advice and assistance" to fellow Rotarians, A.40, and publishes a list of hotels owned by Rotary members as well as a list of Rotary emblem licensees.

A.75. Many members take a business expense tax deduction for their dues, while many others have their dues paid by their employers or businesses. Rotary Club of Duarte v. Board of Directors, 178 Cal.App.3d 1036, 1056-1057 (1986).

Despite a three-paragraph policy recited in one of the volumes on the Rotary, the actual policy of the organization and the actual practice of its members are clear. One of the main



benefits that members of these organizations obtain by joining these clubs is business advantage in the form of business and community contacts, public exposure and publicity as civic-minded businessmen. Thus, the State has a compelling state interest in preventing arbitrary discrimination in access to these business and employment opportunities.

IV. THE PROHIBITION OF SEX DISCRIMINATION IN BUSINESS ORGANIZATIONS LIKE ROTARY IS THE LEAST RESTRICTIVE MEANS TO ASSURE EQUAL EMPLOYMENT OPPORTUNITY FOR WOMEN.

Where a compelling state interest exists, a state regulation is constitutional if it uses the least restrictive means to pursue that interest. Roberts, 468 U.S. at 626. To meet this test, the state must show that it has not significantly infringed expressive rights, or if it has, that the organization's interest in expression is outweighed by the state's compelling interest. Id.





There is no significant infringement of expression unless there is a significant effect on the content of speech.

Roberts, 468 U.S. at 627. In Roberts, this Court concluded that the content of Jaycees' speech would not be affected by the admission of women. Although Jaycees did take public positions on political issues, and its members participated in lobbying, fund-raising and other forms of protected expression, there was no reason to conclude that the admission of women would change the content of this expression. Id. This court found that the Minnesota Public Accommodations Act "requires no change in Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."

Id. This court specifically rejected the



Jaycees' vague and unsubstantiated claims that women members would necessitate a change in the nature or content of these expressive activities. 468 U.S. at 628.

This Court's holding in Roberts rejecting these claims is fully applicable to the case at bar. Rotary's protected expressive activity is virtually identical to the Jaycees', except that Rotary does not even take public positions on political issues. There can be no doubt that, like the Minnesota Act, the Unruh Act does not affect the Rotary goal to "provide humanitarian service, encourage high ethical standards in all vocations, and help build good will and peace in the world," A.35, and does not require Rotary to admit anyone whose philosophy or ideology differs from those of existing members. In fact, unlike the Jaycees, International has not even asserted that the admission of women



would affect the content of its expression. Instead of demonstrating that the content of its speech will be affected, International claims that (a) Rotary members prefer that the organization remain exclusively male, and (b) the international nature of the organization requires that it remain exclusively male. Both of these purported interests fail to demonstrate an infringement of expression substantial enough to outweigh the compelling state interest involved.

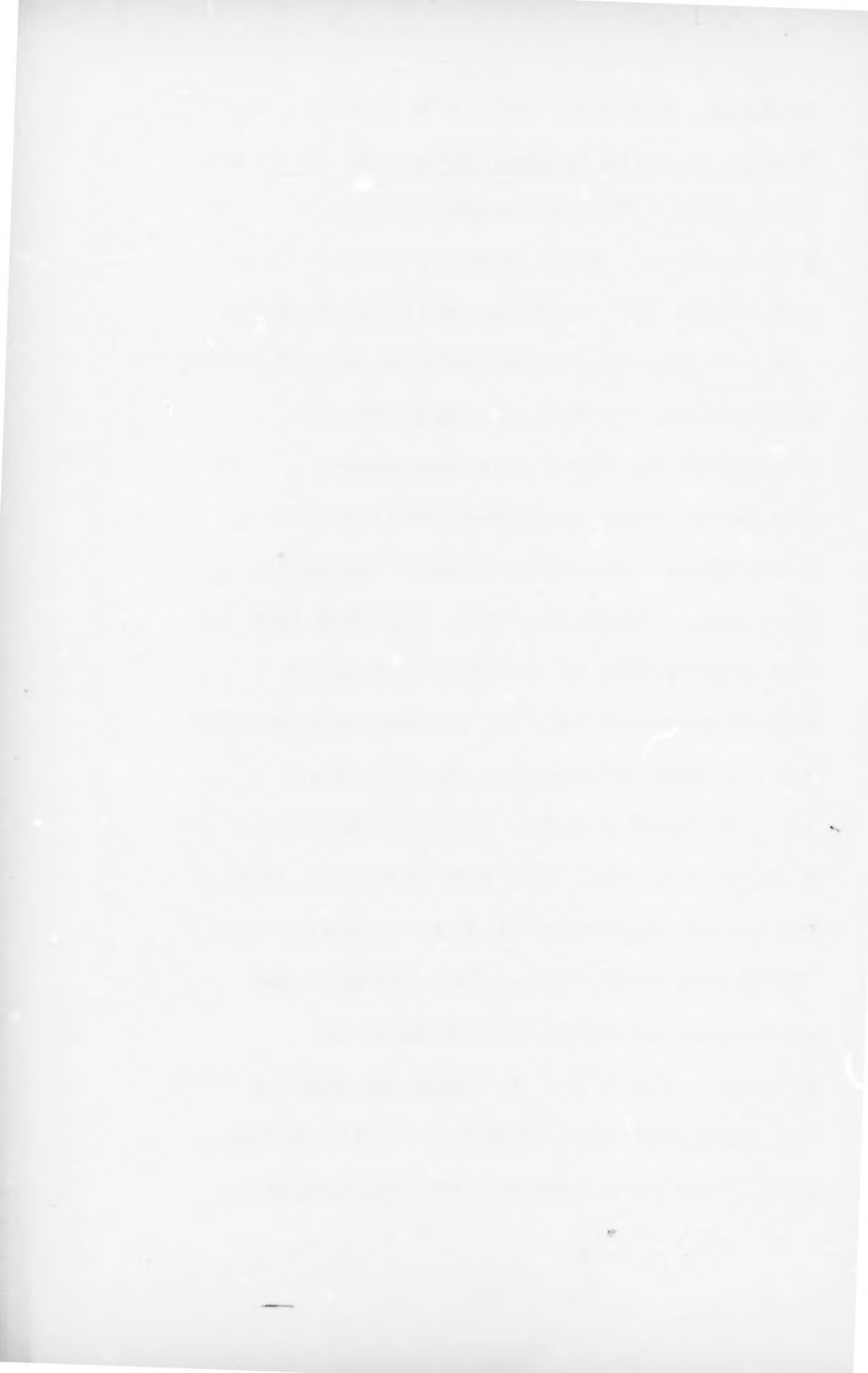
The personal preferences of the members may affect their decision to belong to the organization, but unless the admission of women will significantly change the content of the organization's speech, the First Amendment does not protect members' preferences. The practice of illegal discrimination, including discrimination against women, is not a protected activity. E.g., Runyon v.





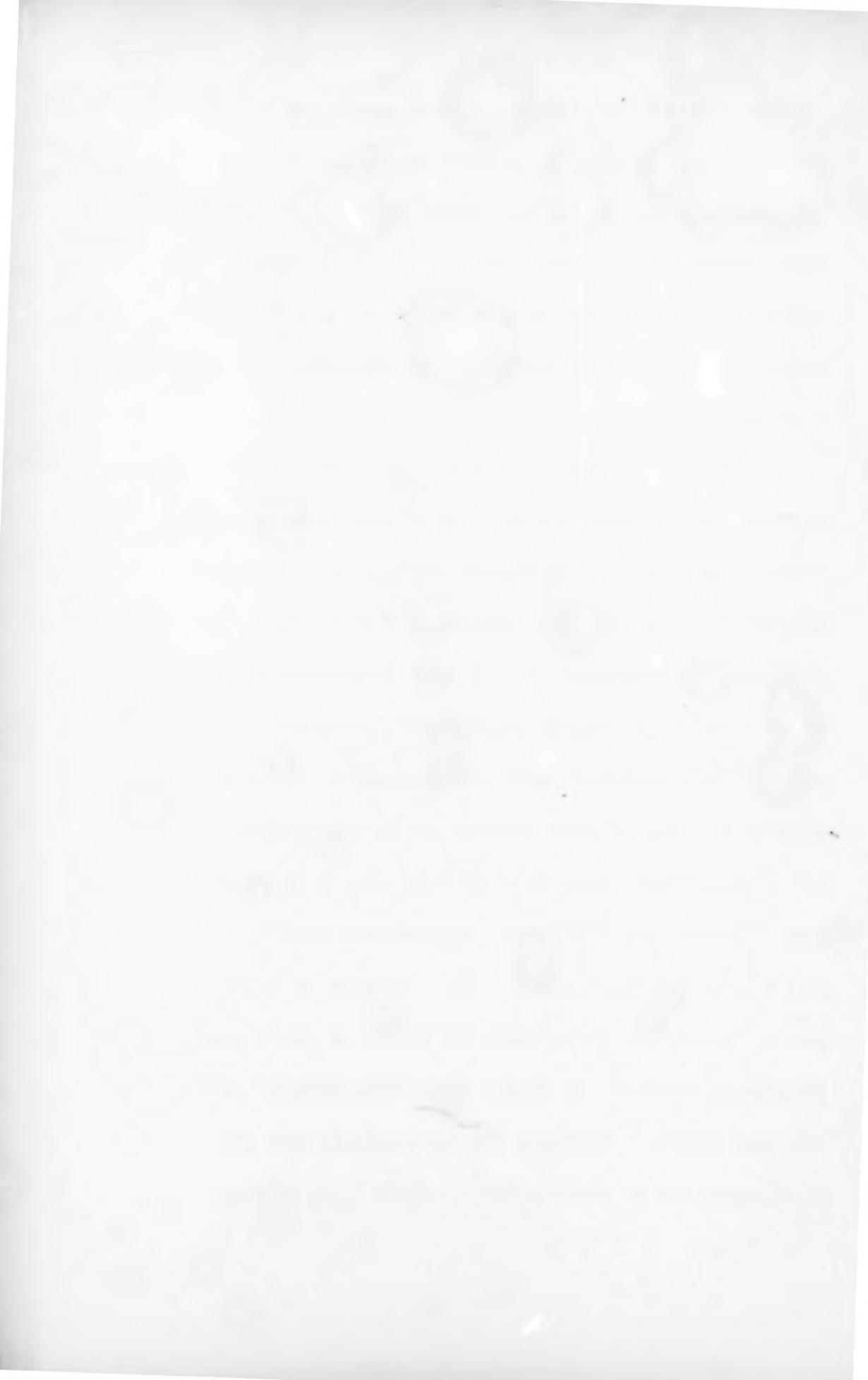
McCrary, 427 U.S. 160, 176 (1976);  
Hishon v. King & Spaulding, 467 U.S. 69,  
75 (1984). "[T]he constitution ...  
places no value on discrimination ..."  
and while "[i]nvidious private discrim-  
ination may be characterized as a form of  
exercising freedom of association  
protected by the First Amendment ... it  
has never been accorded affirmative  
constitutional protection." Norwood v.  
Harrison, 413 U.S. 455, 469-470 (1973).  
The expression of support for such  
discrimination is, of course, protected,  
but no such expression exists here.

Herbert Pigman, General Secretary of  
Rotary International and the most senior  
full-time employee of that organization,  
could not even state what effect the  
admission of women would have on  
Rotary. The most he could do was to  
"conjecture" that members "don't quite  
know what will happen" but feel that



"Rotary's effectiveness and service objectives might be somehow jeopardized if the change were to come before they feel they are ready for it." J.S.App. G-53. This is hardly a showing of a significant infringement of expressive rights.

International is arguing that it should be exempt from the clear state policy prohibiting discrimination, simply because many of its members find that policy distasteful. If the organization were truly private, and did not sell goods, privileges and advantages to its members, the state would have no compelling interest in regulating it, and members would be free to implement their personal preferences. But where a compelling state interest exists, a personal preference for illegal discrimination of course cannot exempt an organization or business from state law. Employers who



would personally prefer not to hire minorities or women and who would feel more comfortable working only with white employees, are still required by law to hire minorities and women: the state's compelling interest in prohibiting employment discrimination overrides that personal preference. The same is true where an employer feels that his or her customers will not feel comfortable conducting business with minority or women employees: The compelling state interest justifies prohibiting discrimination despite these perceived customer preferences. 29 C.F.R. § 1604.2(a)(1)(iii). Given that a compelling state interest does exist in this case, the personal preferences of members are irrelevant.

International also argues that members from other countries with different cultural values will be alienated from Rotary if women are admitted to clubs in



the United States. It is unclear how this affects expression to any great degree, and it is also unclear to what extent it is true. Assuming, for the sake of argument, however, that International's prediction is correct, the argument still fails. International has faced this problem before, and has elected to support United States law even at the risk of losing foreign members. There are a number of Rotary clubs in South Africa, and yet clubs in this country still admit blacks and other ethnic minorities, even though a white South African member having contact with a United States club might well be offended or troubled by that admission policy.<sup>1/</sup>

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<sup>1/</sup> In fact, International is even willing to force chapters in other countries to comply with United States law. Local clubs are not permitted to include a provision in their local club constitutions that excludes anyone from membership on  
(footnote continued)





Thus, the organization has willingly weathered the risks that complying with United States law allegedly poses to its organization, without protesting that its expressive rights have been infringed. To require Rotary to fully comply with state law prohibiting gender discrimination poses no greater risk, and certainly not enough of one to outweigh the compelling state interest.

The content of Rotary speech and philosophy is virtually identical to that of Jaycees', and, like Jaycees, International has failed to show that either of these will be altered by the admission of women as a class. Accordingly, the holding in Roberts that there is no significant infringement of First

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the basis of race, religion and national origin. J.S.App. F-6; G-68, 69.



Amendment freedom of expressive association rights in such a situation, applies with equal force to the case at bar.

V. THE UNRUH ACT AS APPLIED TO ROTARY  
IS RATIONALLY RELATED TO A  
LEGITIMATE STATE INTEREST.

Since fundamental freedom of association rights protected under the First Amendment are not implicated, the Unruh Act as applied to Rotary need only be rationally related to a legitimate state interest. Given that there is a compelling state interest in prohibiting gender discrimination by Rotary, there can be no doubt that the state has a legitimate interest in the same end. Since the Unruh Act was drafted and is applied specifically to eliminate gender discrimination in business establishments like Rotary, it is rationally related to that end.



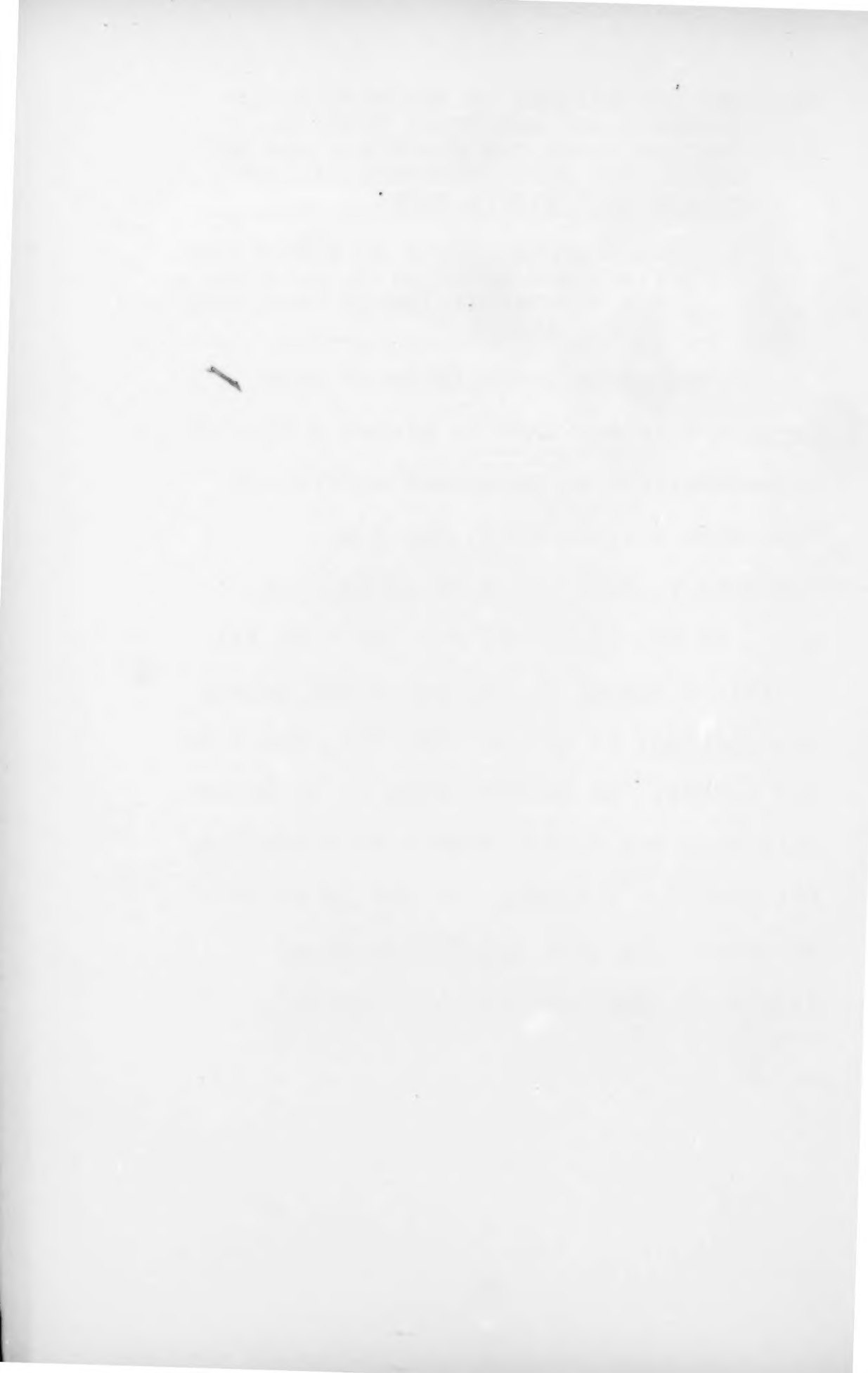
VI. THE DEFINITIONS OF BUSINESS ESTABLISHMENT AND ARBITRARY DISCRIMINATION UNDER THE UNRUH ACT ARE NOT VAGUE, AND BOTH INTERNATIONAL AND DUARTE FALL WITHIN THEM.

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A. California Courts Have Provided Clear And Definite Guidelines For The Definition Of "Business Establishment."

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A "business establishment" under the Unruh Act is one that is either a "public accommodation" or possesses sufficient "business attributes." See e.g., Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal.3d 72, 81-82, 707 P.2d 212 (1985); O'Connor v. Village Green Owners Association, 33 Cal.3d 790, 796, 662 P.2d 427 (1983). In neither case is it necessary that the establishment be organized for profit. O'Connor, 33 Cal.3d at 796. Horowitz, The 1959 California Equal Rights in "Business Establishments"





Statute - A Problem in Statutory Applica-  
tion, 33 So. Cal. L. Rev. 260, 290-291  
(1960).

As Appellants acknowledge, the phrase "public accommodation" has appeared in civil rights legislation in many states, and its scope is generally accepted as including entities that provide goods, services or facilities to their clients, patrons or customers. Appellant's Brief at 43; Alcorn v. Anbro Engineering, Inc., 2 Cal.3d 493, 500, 468 P.2d 216 (1970); Isbister, 40 Cal.3d at 79-80. In distinguishing genuinely private clubs that provide goods, services, or facilities to their members, California courts, as well as Courts in other jurisdictions, have considered two factors: size, and selectivity. If an organization has no limit on the size of its membership, or if it is not selective except in excluding the particular class

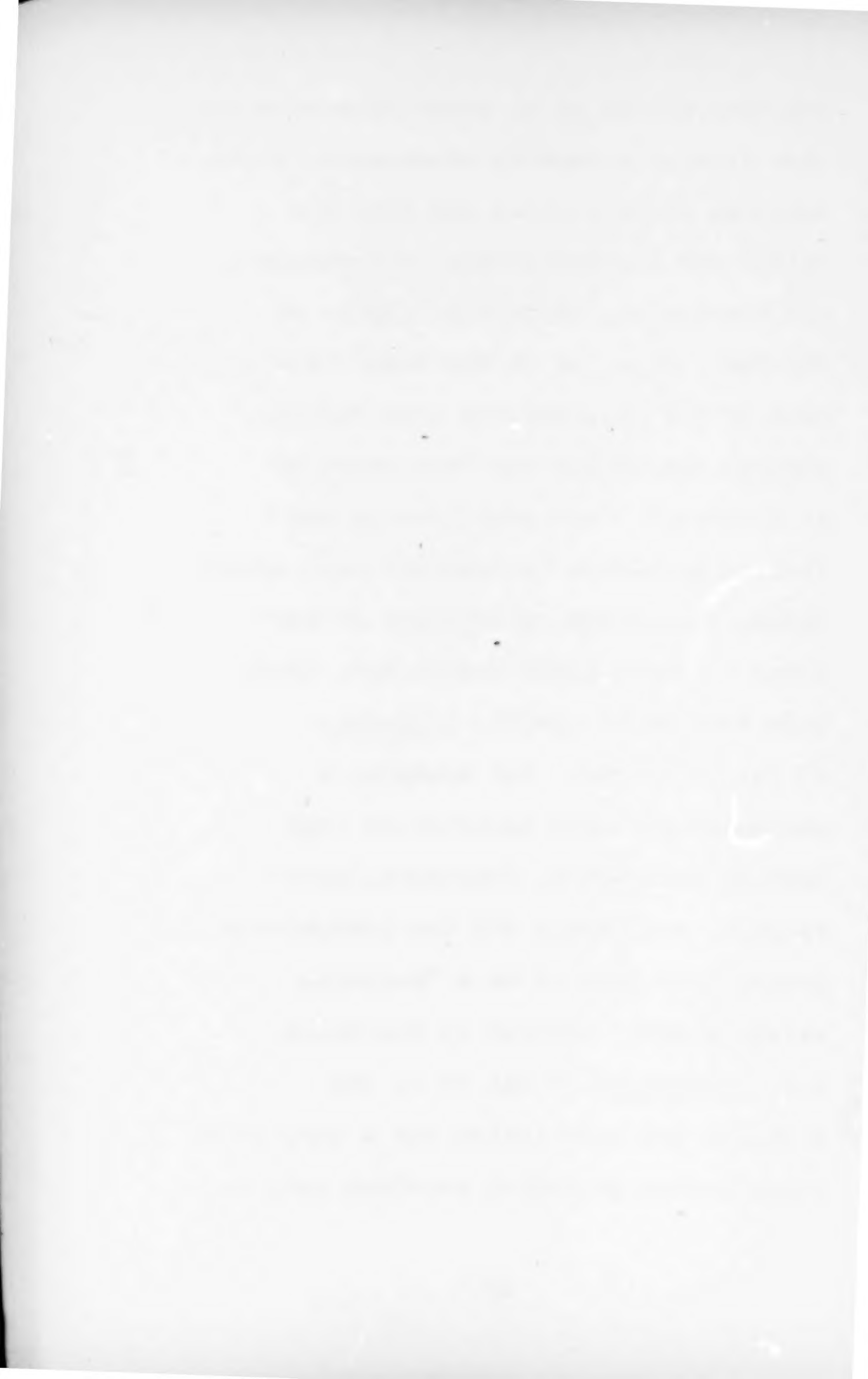


of persons at issue, it is not a private club, and will instead be considered a "public accommodation." Isbister, 40 Cal.3d at 81, 84; Curran v. Mount Diablo Council of The Boy Scouts of America, 147 Cal.App.3d 712, 731-732, 195 Cal.Rptr. 325 (1983); United States Jaycees v. McClure, 305 N.W. 764, 770 (1981); Nesmith v. Young Men's Christian Association, 397 F.2d 96, 101 (4th Cir. 1968).

The second prong of the "business establishment" definition involves "businesslike" attributes. Even when an entity is not engaging in the extensive provision of goods, services or facilities to the public, it may be a "business establishment" if it conducts its affairs as a business, and puts itself in the stream of public commerce. As a leading commentator on the Unruh Act noted, the Act was intended not so much to cover



business places as to cover relationships that involve extending advantages, goods, services or facilities and that are relatively non-continuous, non-personal and non-social. Horowitz, supra, at 287-289. Thus, it is the nature and purpose of the relationship that defines whether the entity has "businesslike attributes." That relationship may involve providing "accommodations, advantages, facilities, privileges or services." Unruh Civil Rights Act, Civil Code Section 51 (1982); O'Connor, 33 Cal.3d at 796. For example, a condominium-owners association that handled management, insurance, maintenance, and repair for the condominium project was held to be a "business establishment" covered by the Unruh Act. O'Connor, 33 Cal.3d at 796. Although the association was a nonprofit organization providing services only to



its limited number of members, it was performing "all the customary business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders." Id.

Neither of these definitions of "business establishment" are overbroad. It is a desirable and logical result that an entity that provides goods, services, facilities or advantages to the public, and does not enforce size or membership restrictions, can and should have its admission policies regulated by the state, which has a strong interest in prohibiting discrimination in public accommodations. As Justice O'Connor noted in the context of freedom of association, "an association must choose its market. Once it enters the marketplace of commerce, in any substantial degree, it loses the complete control over its membership that it would otherwise enjoy





if it confined its affairs to the marketplace of ideas." Roberts, 468 U.S. at 636 (O'Connor, J., concurring).

This reasoning applies equally when an entity makes its goods, services, facilities or advantages available only to a genuinely limited membership. If it conducts itself like a commercial business, it should be treated like one. If, however, a purely social club is characterized by continuous, personal and social contacts, and is providing goods to its members only as an incidental and insubstantial aspect of its operation, it is acting outside the commercial sphere, and the state does not have a compelling interest in regulating it.

The Unruh Act, of course, prohibits only arbitrary discrimination. A business establishment may limit its numbers, or may limit its membership to those interested in, experienced in or in need



of its services, as long as the exclusion bears some rational relationship to the purpose of the organization.

B.     International And Duarte Come  
          Within Both Definitions Of  
          "Business Establishment."

Both International and Duarte are "public accommodations" under the Unruh Act. As has been demonstrated, the process of membership selection is minimal and not designed to ensure congeniality or the likelihood of continuous, personal and social relationships. Additionally, there is no limitation on the number of members of local groups, or on the number of clubs in International. In fact, just the opposite is true: International requires that a prospective club have a minimum number of members in order to join International, and provides substantial resources and pressure to expand the local and International membership.

E.g. J.S.App.G21; A.50-53, 61-66,



70-71. Duarte is a typical example of a club considered to be foundering because of its waning membership. Under the test articulated in Isbister and Curran, as well as courts in other jurisdictions, neither Duarte nor International are genuinely private clubs exempt from the provisions of the Unruh Act.

Both Duarte and International also possess substantial "businesslike attributes." Both market goods, services, facilities and advantages to their members in the exchange for club dues. E.g. A.21. Both provide program materials and resources for improving business and management skills and organizing civic events. E.g. A.14-21, 92-93 In addition, as The Court of Appeal noted, Rotary extends substantial business advantages to its members. Despite the club's written policy, the contacts and forum it provides make a substantial





difference for its members, a fact to which many members testified at trial. Rotary, 147 Cal.App.3d at 1057. See also, A.42. Many members deduct their Rotary dues on their tax returns as a business expense, with the approval of the I.R.S. Rotary, 147 Cal.App.3d at 1057. Many others have their dues paid by their employers or businesses, because Rotary membership has proved to be good for business. Id.

International is a nonprofit corporation recognized under Illinois State law. It includes a 'publishing house' division that produces an extensive library of Rotary books, manuals, pamphlets, and periodicals. Id. at 1053. It produces training and public relations materials for distribution to local clubs, e.g. J.S.App.G9-12, A.14-21, it publishes and sells subscriptions to the official magazine of the Rotary in



two languages, A.57, it licenses and collects royalties for the use of the Rotary emblem, A.67, and it publishes and distributes a directory of Rotary members, hotels run by Rotary members, and firms licensed to use the Rotary emblem. Id. at 1054-1055.

Duarte subscribes to these extensive goods and services by paying annual dues and remaining a member of International. Members of Duarte would not otherwise be able to receive the benefits provided by International, since International has no individual members. J.S.App.C4-5  
Therefore, Duarte plays a vital role in the functioning of International's business and so takes on the latter's businesslike attributes.



If International and Duarte fit into only one of the two possible definitions of a business establishment, this fact alone would be enough to bring them within the scope of the Unruh Act, since the definitions are in the alternative. See, O'Connor, 33 Cal.3d at 796; Isbister, 40 Cal.3d at 83. Since each organization falls within both possible definitions, each is a business establishment, and each is subject to the provisions of the Unruh Act.

C.     The Exclusion Of Women From  
          Rotary Is Arbitrary And There-  
          fore Prohibited By The Unruh  
          Act.

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The Unruh Act prohibits any arbitrary discrimination by business establishments. In re Cox, 3 Cal.3d 205, 216, 474 P.2d 992 (1970). While owners of business establishments may certainly exclude individuals who act inappropriately or who disrupt the operations of



the enterprise, "the Unruh Act does not permit a business enterprise to exclude an entire class of individuals on the basis of a generalized prediction that the class "as a whole" is more likely to commit misconduct than some other class of the public." Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721, 738-739, 640 P.2d 115 (1982).

The blanket exclusion of a particular class of individuals may not be arbitrary if it operates as a "reasonable and permissible means under the Unruh Act of establishing and preserving specialized facilities for those particularly in need of such services or environment." Marina Point, 30 Cal.3d at 742-743. Thus, housing facilities specifically designed and administered for the elderly might properly exclude young children. Id. The social need such facilities serve, however, must be well-documented and clearly





established as a matter of public policy. Id. Where activities and facilities are unsafe or unsuited for an entire class of individuals, that class may properly be excluded from them.

Isbister, 40 Cal.3d at 88.

Where, however, the business establishment cannot show that the admission of the excluded class poses a danger to safety or a serious and documented threat to the continued operation of the establishment, the Unruh Act unambiguously prohibits the continued exclusion of the class. Id. at 89-90.

Appellants claim that the Unruh Act is vague because it "prohibits some forms of discrimination but not others" and because "good faith and bare rationality" are not sufficient to permit blanket group discrimination. Appellants' Brief at 42. But it is of course in the nature of all anti-discrimination laws that some



types of discrimination are excused or justified, while others are prohibited. The Unruh Act permits business establishments to exclude individuals for reasons "rationally related to the services performed and facilities provided." In re Cox, 30 Cal.3d at 212.

International seeks a blanket exclusion of women as a class from Rotary, but it has failed to indicate any safety or suitability concerns justifying the exclusion. International has not demonstrated or even claimed that the admission of women would prevent the club from performing civic activities, or that it provides services to its members that are unsafe or unsuitable for women. Instead, it has simply alleged that women as a group prevent the formation of a friendly, civic-minded group that can effectively develop and implement programs for community involvement. This is



precisely the type of discrimination based on a broad, undocumented generalization about a class of individuals that the Unruh Act and similar state and federal legislation is designed to prohibit. If an individual woman or man were to disrupt the organization's operations, the Unruh Act of course does not prohibit the organization from excluding that individual. It is the unfounded and blanket exclusion of an entire class of individuals that is prohibited under the Unruh Act.

The Unruh Act has clearly and unambiguously prohibited arbitrary discrimination in business establishments. Since both International and Duarte fall squarely within both definitions of a business establishment, and since the blanket exclusion of women as a class from the Rotary is arbitrary, the California Court of Appeal correctly held





that International's discriminatory policies violate the Unruh Act.

### CONCLUSION

This case presents the question of whether a state may prohibit sex discrimination in large, unselective businessmen's organizations that sell leadership training, business contacts, and employment opportunities to their members. As this Court determined in Roberts, such a prohibition does not infringe members' First Amendment rights. This case does not involve the freedom of intimate association, since this Court has consistently reserved that fundamental right to familial relationships. Since Rotary only engages in limited expression, it only has minimal freedom of expressive association. California's compelling interest in prohibiting sex discrimination in



business organizations, an interest this Court recognized in Roberts, justifies the minimal infringement of those rights. The admission of women would not affect the content of of Rotary's speech, and therefore the application of the Unruh Act to Rotary is the least restrictive means of accomplishing the state's interest.

The Unruh Act and subsequent judicial interpretation of the Act have clearly defined "business establishments" to include both public accommodations and entities with sufficiently business-like attributes. Since Rotary is large and unselective, sells its goods and services to members in exchange for dues, and operates as a publishing, conference-organizing, and licensing enterprise, it fits within both possible definitions of "business establishment." The blanket exclusion of women from Rotary does not



reflect well-documented safety or special facility concerns and therefore constitutes precisely the type of arbitrary discrimination prohibited by the Act.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

Appellants,

v.

ROTARY CLUB OF DUARTE, et al.,

Appellees.

On Appeal From the Court of Appeal  
of the State of California  
Second Appellate District

BRIEF OF THE CITY OF NEW YORK AND  
THE NEW YORK CITY COMMISSION ON THE  
STATUS OF WOMEN AS AMICI CURIAE IN  
SUPPORT OF APPELLEES ROTARY CLUB OF  
DUARTE, ET AL.

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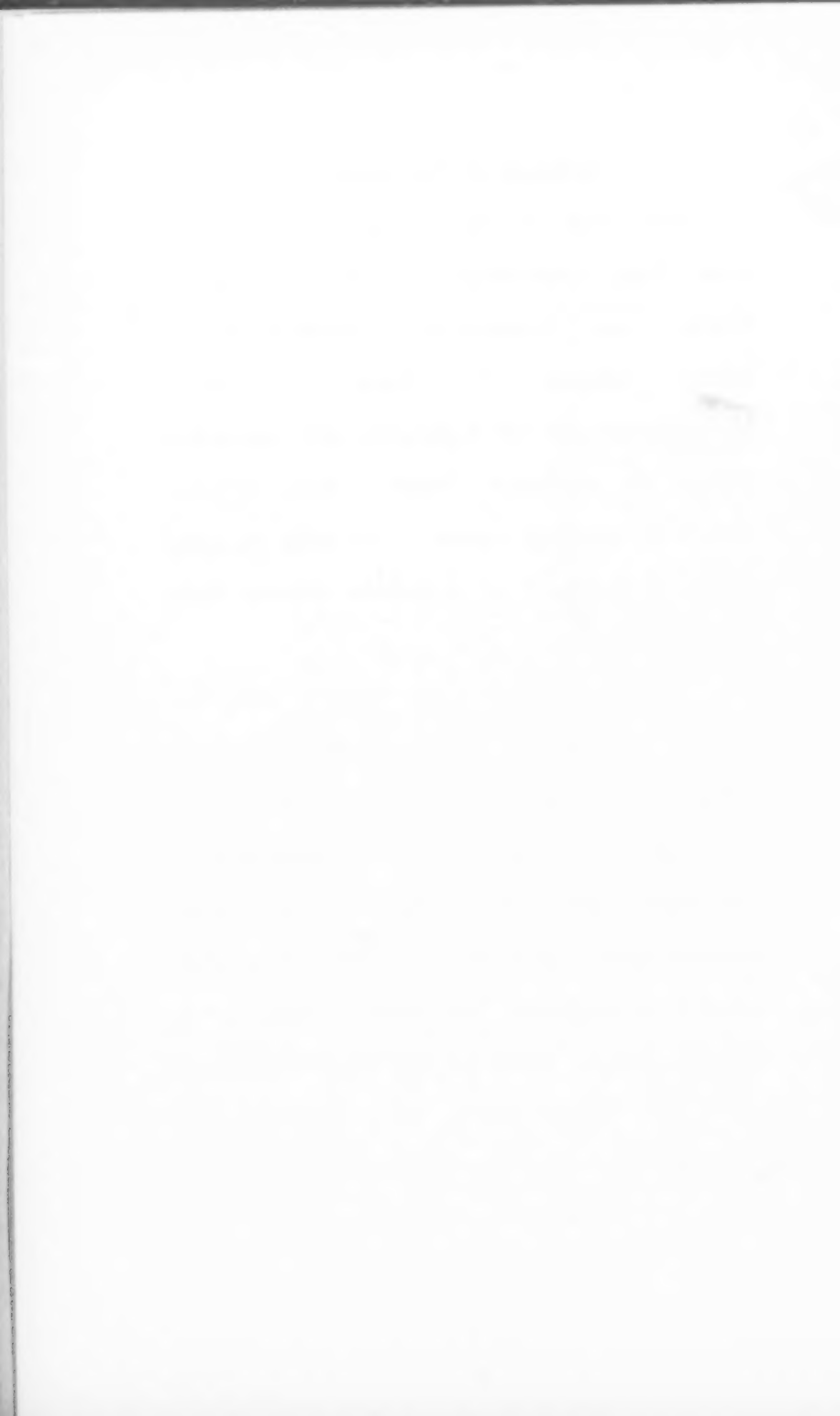
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### Interest of the Amici

The City of New York and the New York City Commission on the Status of Women (the "Commission"), established by Mayor Edward I. Koch to make recommendations for legislative and executive action to eliminate discrimination against women in the City, submit this brief as amici curiae in support of Appellees Rotary Club of Duarte, et al.

New York City (the "City") and the Commission have an interest in the affirmance of the judgment below because a City law is currently being challenged in New York State and Federal court on similar constitutional grounds as the California statute at issue in this case. While Local Law 63 differs from the Unruh Civil Rights Act (the "Unruh Act"), both statutes seek to give women and minorities equal access to publicly available goods, services, and



accommodations. In addition, amici have an interest in apprising this Court that a case cited in Appellants' brief concerning the New York State Human Rights Law has no precedential value.

### The Judgment Below

The Unruh Act prohibits discrimination based on sex, race, color, religion, ancestry, or national origin in "[a]ccommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51. The California Court of Appeals, Second Appellate District, determined that both Appellant Rotary International and Appellee Rotary Club of Duarte are "business establishments" under the Unruh Act; the court concluded that Rotary International had impermissibly revoked the charter of the Duarte club for





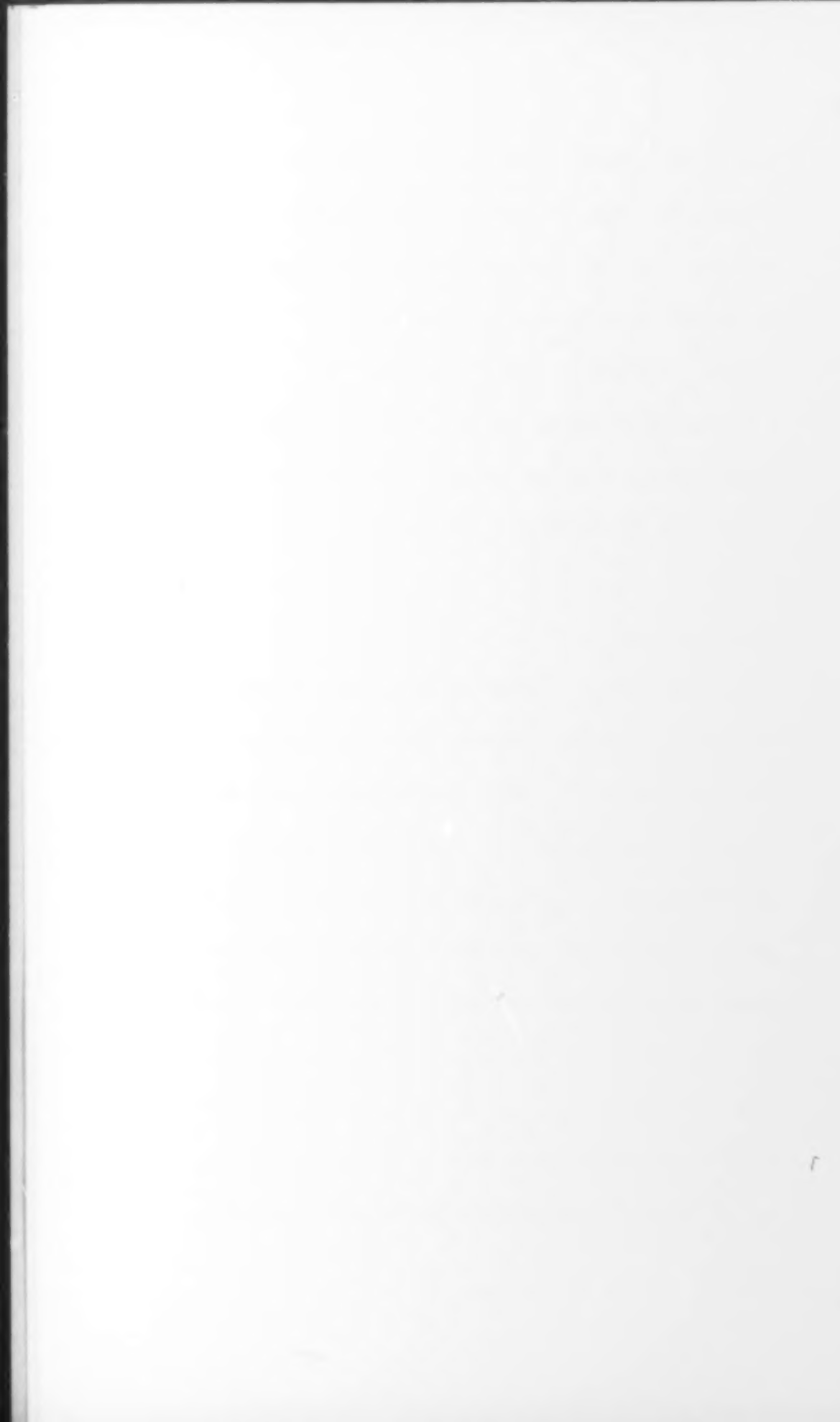
admitting three women in violation of its standard Rotary club constitution. The appellate court then directed the trial court to enter a judgment reinstating the Duarte club's charter and enjoining Rotary International from enforcing its male-only membership restriction on the Duarte club. (App. C-29, 39-40.)<sup>1</sup>

#### Local Law 63

The City Administrative Code prohibits invidious discrimination in a "place of accommodation" and specifically exempts "[a]ny institution, club or place of accommodation which proves that it is in its nature distinctly private." N.Y.C. Admin. Code §§ 8-107(2), -102(9). (The New York

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<sup>1</sup>"App." refers to Appellants' Appendix.



Executive Law contains the same prohibition.  
N.Y. Exec. Law §§ 292,296.)

Local Law 63 amended the Code by adding, among other things, criteria for determining when a place of accommodation is "distinctly private in nature." It provides in part as follows:

[a]n institution, club or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, uses of space, facilities, services meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.

The rationale for these criteria is contained in the City Council's Legislative Declaration accompanying Local Law 63, which provides in part that:

One barrier to the advancement of women and minorities in the business and professional life of the City is the discriminatory practices of certain membership organizations where business deals are often made and personal



contacts valuable for business purposes, employment and professional advancement are formed.

The Council recognizes the interest in private association asserted by club members. However, the Council finds that this interest does not overcome the public interest in equal opportunity... The Council finds that business activity often occurs at clubs having more than four hundred persons to discuss business. The dues and expenses of members at such organizations are often paid by their employers, because the employee's activities at the organization help to develop the employer's business. The organizations also rent their facilities through members for use as conference rooms for business meetings attended by nonmembers. Organizations where such practices occur provide benefits to business entities and persons other than members and thus are not in fact 'distinctly private' in their nature.

On October 9, 1984, the day that Local Law 63 went into effect, the New York State Club Association, Inc. (the "Club Association") brought a declaratory judgment action in State court to have the law declared unconstitutional. New York State



Club Association, Inc. v. City of New York,  
No. 25028/84 (N.Y.Sup.Ct., N.Y.Co.) On  
October 29, 1985, New York Supreme Court  
Judge Louis Grossman granted summary  
judgment in favor of the City and declared  
Local Law 63 to be constitutional and valid.  
(N.Y.L.J., October 31, 1985.) His opinion  
provides in part that:

The clubs affected by this  
legislation must have a membership  
of over 400 individuals. Such  
number is not small, nor can it be  
viewed as exclusive. (See *Roberts  
v. United States Jaycees*, supra).  
Moreover, the statute requires that  
the clubs receive revenues from  
nonmembers for the purpose of a  
trade or business. This  
commercial activity generating  
revenue from outsiders further  
undermines the claim of  
exclusivity.

\* \* \*

The inclusion of commercial activity  
as a criteria fits squarely within  
the concepts and guidelines laid  
down in *Power Squadrons v.  
Appeal Board*, supra and *Roberts*.  
The City statute, in prohibiting  
discriminatory practices, responds  
precisely to the substantive  
problems, which legitimately  
concerns it and abridges no more





speech or associational freedom than is necessary to accomplish its purpose. (See City Council v. Taxpayers for Vincent, U.S. 104.

His decision was affirmed by the Appellate Division, First Department, on July 31, 1986, with one dissent, which concerned the exemptions in the law for benevolent orders. (N.Y.L.J., August 1, 1986.) The case is now before the New York Court of Appeals and was argued on January 5, 1987.

#### Enforcement of Local Law 63

In January 1986, after the Club Association's motions for a stay of enforcement of Local Law 63 were denied by the Supreme Court, the Appellate Division, and the Court of Appeals, the City Human Rights Commission filed complaints against three all-male clubs suspected of being in violation of the statute. In March 1986, two of these clubs brought separate actions against the City in the District Court for the



Southern District of New York to declare Local Law 63 unconstitutional. The University Club v. The City of New York, et al., 86 Civ. 2330 (GLG); The Union League Club v. The City of New York, et al., 86 Civ. 2343 (GLG). A decision on the City's motion to dismiss these actions is pending.

The third club, the Century Association, entered into a conciliation agreement with the City, pursuant to which it admitted excluding women from membership and from certain club facilities; the club also conceded that it is not "distinctly private" within the meaning of Local Law 63. The Century Association agreed to consider women as candidates for membership and to admit them according to the same procedures as men on the "Effective Date" of the agreement, defined as the later of a decision upholding the validity of Local Law 63 by



the Court of Appeals "and, if the case is carried there" by the United States Supreme Court, or, alternatively, a final disposition not invalidating Local Law 63 or its enforcement by the highest federal court considering the cases brought by the Union League Club and the University Club.

\* \* \*

An affirmance by this Court of the judgment below should convince the challengers of Local Law 63 of the futility of their battle for constitutional protection of the right of all-male clubs, whose activities involve the participation of nonmembers for commercial purposes, to exclude women from membership and from equal access to club facilities.





## SUMMARY OF ARGUMENT

The court below properly found that Rotary International is a "business establishment" within the meaning of the Unruh Civil Rights Act, which violated that law by revoking the charter of the Rotary Club of Duarte for admitting women. Appellants' claim, that Rotary International's male-only membership policy is protected by the First Amendment, is based on a misconstruction of the record and reliance on a New York case which is no longer of precedential value. The record establishes that Rotary clubs are unlimited in size, that many employers underwrite Rotary club dues of their employees, and that club activities involve the regular participation of nonmembers of both sexes and have a



substantial commercial purpose. In addition, there is no evidence in the record that women members of Rotary clubs will have a detrimental effect on the organization's speech greater than necessary to accomplish California's compelling interest in eliminating discrimination against its female citizens. Thus, this case is squarely within this Court's holding in Roberts v. United States Jaycees, 468 U.S. 609 (1984), and Rotary International's discriminatory membership policy is not protected by either the First Amendment's freedom of intimate or expressive association.

The decision of the court below should be affirmed.



## ARGUMENT

### POINT I

ROTARY CLUBS ARE LARGE ASSOCIATIONS OF BUSINESSMEN WHOSE ACTIVITIES INVOLVE THE REGULAR PARTICIPATION OF NONMEMBERS, INCLUDING WOMEN. THE COURT BELOW THEREFORE PROPERLY HELD THAT ROTARY INTERNATIONAL'S EXCLUSION OF WOMEN FROM ITS MEMBER CLUBS IS NOT ENTITLED TO THE PROTECTION OF THE FIRST AMENDMENT'S FREEDOM OF INTIMATE ASSOCIATION.

The California Court of Appeals properly found, following this Court's decision in Roberts, 468 U.S. at 609, that the Unruh Act does not abridge Rotary International's freedom of intimate association. (App., C-35, C-38.) While Appellants acknowledge that Roberts is controlling (App. Br., 15, 18)<sup>2</sup>, they contend that this authority gives Rotarians

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<sup>2</sup>"App. Br." refers to Appellants' Brief.



a First Amendment freedom to discriminate against women.

Because the size of an organization is a major factor in determining whether it should be constitutionally protected as an intimate association, Roberts, 468 U.S. at 620, Appellants depict local Rotary clubs as "generally small." (App. Br. 15.) The record demonstrates that this is not, in fact, the case. Significantly, there are more than three times as many Rotarians as there are Jaycees: 905,750 members of 19,788 Rotary clubs in 1982 (App. F-2), compared to 295,000 members of the Jaycees in 7,400 clubs in 1981. 468 U.S. at 609. There is no limit on the size of Rotary clubs (J. App., 35)<sup>3</sup>, and some clubs have up to 900 members. According to club literature,

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<sup>3</sup>"J. App. refers to the Joint Appendix.





Rotarians are members of one great big Rotary club -- the "Rotary family." (J. App. 85). As Herbert A. Pigman, General Secretary of Rotary International testified, "[t]he fellowship is much broader than just the local fellowship. Rotary is a worldwide fellowship and, particularly as the world has developed in its communication, travel has increased dramatically, this is becoming an increasingly important dimension of the organization." (App. at G-44).

Appellants' description of membership in Rotary as selective is also misleading (App. Br. 21), since, like the Jaycees in Roberts, "[n]umerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another...." 468 U.S. at 621. Rotary International encourages Rotarians to invite guests (such as their employees, competitors, and



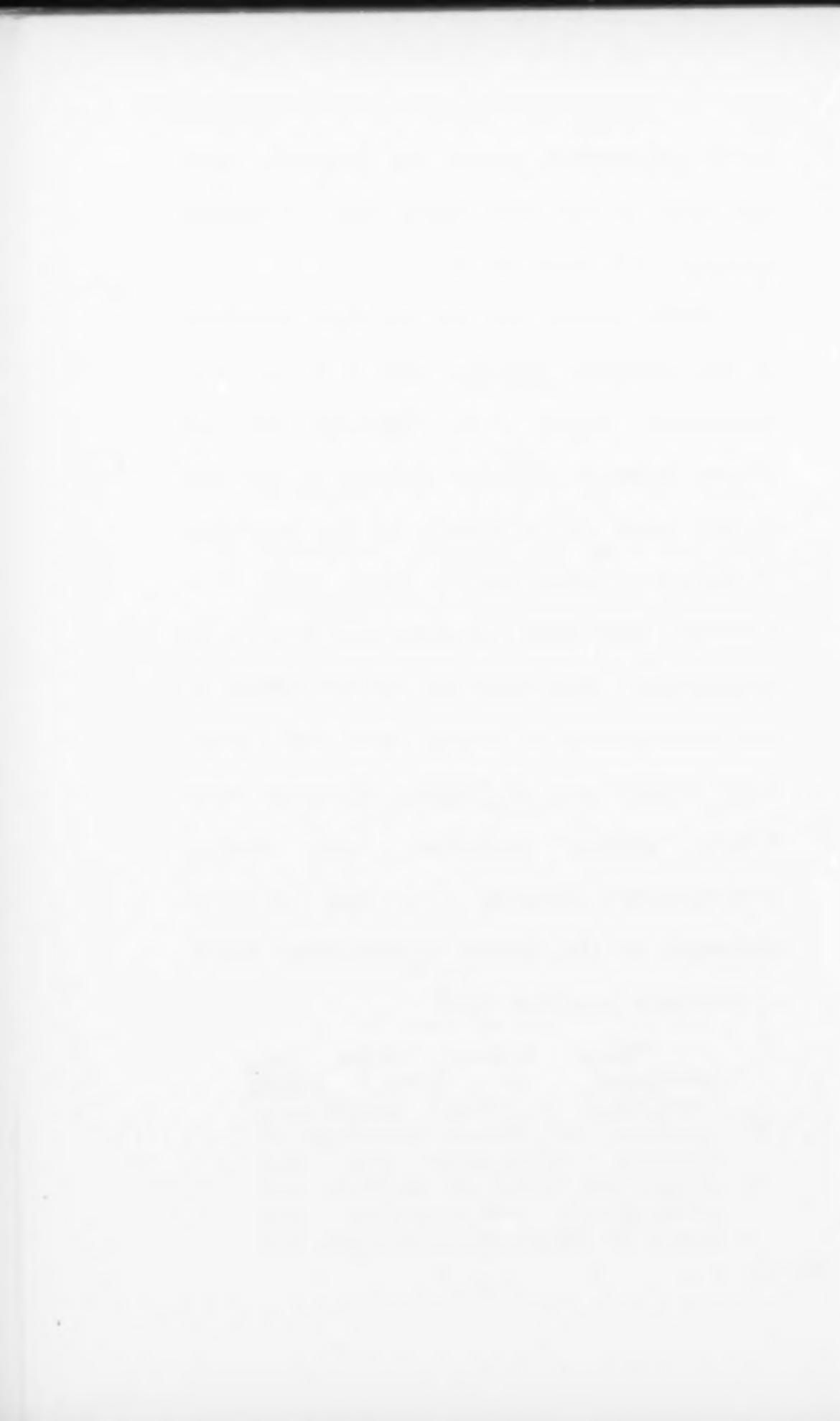
customers) to weekly club meetings, and to give them copies of "Service is My Business," an official Rotary publication. (J. App. 25,39.) It is not uncommon for a Rotary club meeting to have guests "in the tens and twenties." (App. G-24.) Rotary clubs can also have joint meetings with other service clubs on specified occasions. (J. App. 39.) Prospective members of a club are often invited to several regular meetings before being asked to sign an application card. (J. App. 66.) Rotary clubs are urged to include non-Rotarians in club-sponsored panels, seminars, and conferences. (J. App. A-14, A-17, A-45.) Members are encouraged to invite students, who are not eligible to join Rotary, to club luncheons. (J. App. 66-67.) Indeed, the entire public is invited to attend meetings of new Rotary clubs -- an official press release about the formation of a new Rotary club



gives information about the location, date and time of the new club's regular weekly meeting. (J. App. 96-97.)

While women can be associate members of the Jaycees, Roberts, 468 U.S. at 613, Appellants assert that "[t]here are no official women's affiliates entitled to use the Rotary name or participate in the activities of Rotary International." (App. Br., 22.) However, Appellants' disingenuous attempt to distinguish Rotary from the Jaycees based on the participation of women must fail, since many women are unofficially involved with Rotary service activities, with Rotary International's blessing. (J. App. 44.) A statement of the Rotary International board of directors provides that:

"Many Rotary clubs are privileged to have ladies committees or other associations composed of women relatives of Rotaries cooperating with and supporting them in service and other Rotary club activities. The board of directors encourages and





commends such groups for the fine work which they perform." (J. App. 45.)

Rotary International also authorizes the women in these auxiliaries to wear the official Rotary emblem as a lapel button. (J. App. 68.)

In sum, the record establishes that Rotary clubs, like the Jaycees, are not highly personal organizations whose discriminatory membership policies should be accorded constitutional protection under the First Amendment's "freedom of intimate association."



## POINT II

ROTARY INTERNATIONAL IS A  
LARGE COMMERCIAL ENTERPRISE  
AND ROTARY CLUBS ARE  
EXTENSIONS OF THE  
WORKPLACES OF THEIR  
MEMBERS. THE COURT BELOW  
THEREFORE PROPERLY HELD  
THAT ROTARY INTERNATIONAL'S  
EXCLUSION OF WOMEN FROM ITS  
MEMBER CLUBS IS NOT  
PROTECTED BY THE FIRST  
AMENDMENT'S FREEDOM OF  
EXPRESSIVE ASSOCIATION.

Appellants' contention that the Unruh Act impermissibly infringes on Rotarians' "freedom of expressive association" was likewise rejected by the California Court of Appeals, in reliance upon Roberts. "To the extent that International's freedom of expressive association is involved," the court stated, "infringement of this right is clearly justified by the state's compelling interest in abolishing sex discrimination by business establishments." (App., C-37.)

The Court of Appeals concluded that Rotary International is a "business



establishment" under the Unruh Act after an examination of its corporate structure, particularly its Communications Division, which publishes hundreds of publications; its sources of revenue, which include license fees and royalties from commercial firms which manufacture and sell the official Rotary emblems; and from Rotary International's official directory, which includes a list of hotels owned and operated by Rotarians and firms licensed by Rotary International to manufacture and sell items with the official Rotary, Rotaract or Interact name and emblem. (App., C-16-22.)

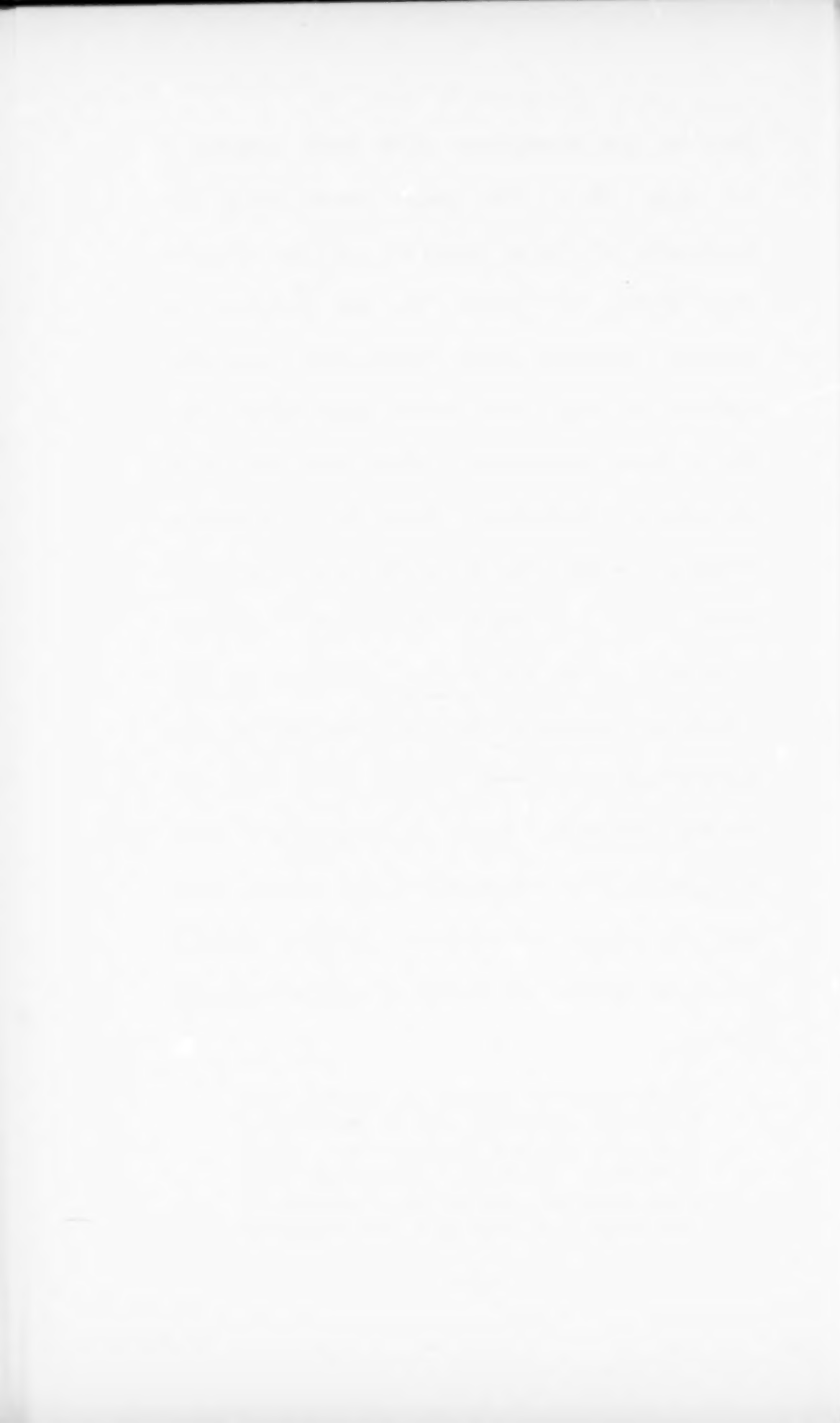
The Rotary Club of Duarte was also classified by the court below as a "business establishment" based on evidence establishing that Rotary clubs function as an extension of the workplaces of their members. (App., C-22-27.) (That is literally true on club "Rotation Days," when the weekly meeting is



held at the workplace of a club member.) (J. App. 25.) The court below cited the testimony of three members of the Duarte club that they joined for the purpose of making contacts with community business leaders so that they could more effectively serve their employers. One paid his dues personally, deducting them as a business expense, while the dues of the other two were paid by their employers. (App., C-25-26.) The court also referred to the stipulated testimony of the treasurer of the Bakersfield, California Rotary club, that out of 200 members, 8 or 10 paid their dues personally, and the dues of the others were paid by their employers. (App., C-26.) On these facts, the Court of Appeals found that:

This evidence leaves no doubt that business concerns are a motivating factor in joining local clubs. While Rotarians perform numerous and commendable charitable services at the local, national and international





levels, the evidence establishes that there are business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers.

The evidence simply does not support the trial court's finding that these business advantages are merely incidental. By limiting membership in local clubs to business and professional leaders in the community, International has in effect provided a forum which encourages business relations to grow and which enhances the commercial advantages of its members. (App., C-26.).

Appellants ignore these facts, relying on the fiction that the majority of its members comply with Rotary International's official written policy against the commercialization of Rotary. (App. Br., 30-31.) Appellants then suggest that Rotary clubs are entitled to First Amendment protection even if some members use Rotary for business purposes and even if their dues are paid by their employers, citing Kiwanis Club of Great Neck v. Board of Trustees of Kiwanis International, 83 Misc.2d 1075 (Sup.



Ct., 1975), aff'd, 52 A.D.2d 906 (2d Dept', 1976), aff'd, 41 N.Y.2d 1034 (1977); cert. den., 434 U.S. 859 (1977). (App. Br., 31-32.) In that case, similar commercial activity by some members of a New York chapter of the Kiwanis was held not to render the club subject to the antidiscrimination provisions of the New York State Human Rights Law. 41 N.Y.2d 1034.

Over the past decade, however, New York courts have studiously ignored the Kiwanis Club of Great Neck case. Indeed, the Court of Appeals has referred to Kiwanis Club of Great Neck only once since 1977, in United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 413 (1983). That reference, moreover, was to the dissenting opinion of Judge Shapiro in the Appellate Division; he would have sustained plaintiffs' complaint under the State Human Rights Law on the ground that



by enacting that statute, the Legislature intended "[t]o encompass the right of self-employed professionals and persons engaged in business to have access, without discrimination based on sex, to groups or clubs other than those distinctly private in their nature and which give to the members additional potential sources of patronage or business." (Emphasis in original.) 52 A.D. 2d at 916-917.

It is clear that Kiwanis Club of Great Neck no longer has any precedential value, and would not be followed now in light of the Court of Appeals' more recent ruling in Power Squadrons. 59 N.Y.2d 401. The court explicitly held in that case that the State Human Rights Law applies to membership organizations which are "[n]ot in fact private except for purposes of discrimination." Among the factors which the Court of Appeals found relevant to





determining whether an organization should be considered a "distinctly private" club, and exempt from the law's prohibition against discrimination, include whether the club "[l]imits the use of the facilities and the services of the organization to members and bona fide guests of members," and whether it "[d]irects its publicity exclusively and only to members for their information and guidance." 59 N.Y.2d at 412-13.

It is obvious from the record in this case that Appellants encourage public participation of nonmembers in local Rotary club activities, which are substantially devoted to the improvement of business and professional skills, and actively promote Rotary clubs to the business community. (J. App., 14, 21, 39, 40, 41-42, 45, 59, 60, 64, 66, 78.) Thus, under Power Squadrons, 59 N.Y. 401, Rotary International's all-male membership policy would not be exempt from



the New York Human Rights Law's prohibition against invidious discrimination.

Appellants' "freedom of expressive association" argument is spurious in any event. There is no evidence whatsoever that admitting women to membership in Rotary will adversely affect the organization's speech. Indeed, when Mr. Pigman, Rotary International's General Secretary, was asked about the impact on Rotary of invalidating its all-male restriction, he responded: "[T]hey don't know... ." (App., G-53). As the California Court of Appeals properly found, Mr. Pigman's testimony "[d]oes not support a finding that the admission of women into the local Rotary Club of Duarte would cause the downfall of the District or International or seriously interfere with Rotary's objectives." (App., C-31.)



With no evidence to the contrary, it is not unreasonable to assume that women Rotarians may have a positive effect on the professed goals of Rotary clubs "[t]o provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." (App., 35.)



## CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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24  
No. 86-421

Supreme Court, U.S.  
**FILED**

**JAN 28 1987**

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CLERK

In The  
**Supreme Court of the United States**  
October Term, 1986

Board of Directors of Rotary International, et al.,  
*Appellants,*  
v.

Rotary Club of Duarte, et al.,  
*Appellees.*

Appeal from the Court of Appeal of the State of California,  
Second Appellate District

Brief Amici Curiae of the California Women Lawyers; National Organization for Women; NOW Legal Defense and Education Fund; San Francisco Women Lawyers Alliance; Women Lawyers' Association of Los Angeles; American Jewish Committee; American Women In Radio and Television, Inc.; Center for Constitutional Rights; Coalition of Labor Union Women; Connecticut Women's Educational & Legal Fund; Equal Rights Advocates; Northwest Women's Law Center; Women's Action Alliance, Inc.; Women's Bar Association of the State of New York; Women's Equity Action League; Women's Law Project; Women's Legal Defense Fund; Women Employed; and Women In Business In Support Of Appellees.

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## I.

### STATEMENT OF INTEREST OF AMICI CURIAE

Amici are national and state organizations, open to women and men, committed to achieving equal opportunity for women and minorities in the business, professional and civic life of our country. Amici's individual statements of interest appear in Appendix A. Amici's members are personally aware of the high level of business activity at many of the country's purportedly "private" clubs and organizations, such as Rotary International, and of the lost business opportunities when women and minorities are barred from membership at these business oriented clubs. Because of the direct impact on women's and minorities' full access to clubs and organizations which are centers of business and decision making activity, amici have closely followed the progress of the case at bar and are deeply concerned with its outcome.

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## II

### STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by Appellee, Rotary Club of Duarte.

## III.

**SUMMARY OF ARGUMENT**

Rotary International is a large, world-wide organization of business and professional leaders which confers significant business advantages on its members. Application of the Unruh Civil Rights Act to Rotary International narrowly serves the profoundly important state interest of ensuring nondiscriminatory access to commercial opportunities, including membership in business-related clubs and organizations. Discriminatory membership policies at such organizations have a crippling effect on the professional opportunities and advancement of women and minorities.

Application of the Unruh Act to business-related clubs and organizations like Rotary International does not infringe their members' First Amendment rights of either intimate or expressive association. Rotary's size, obsession with growth and publicity, inclusion of non-members in its activities, business purpose and its business-oriented selection system deprive it of any constitutional right of intimate association.

Nor does Rotary engage in the types of expressive activities protected by the First Amendment. If there is any intrusion on Rotary International's or its members' freedom of expressive association, it is outweighed by California's compelling interest in removing barriers to the economic advancement and political and social integration of all of its citizens.

## IV.

## ARGUMENT

## A. Introduction\*

In recent years, wide attention has been given to the impact on women and minorities of exclusion from clubs and organizations that hold themselves out as private, but are in fact centers of business activity.<sup>1</sup> Such exclusion deprives women and minorities of equal economic opportunity, subjects them to personal humiliation and confirms a belief that women and minorities are inappropriate participants in the exercise of power by barring them from informal centers of power. The numerous resolutions, executive orders and personnel policies recently promulgated which prohibit the conduct of official business at discriminatory clubs and organizations implicitly recognizes that such exclusion is harmful and that there is

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\*Although, in many cases, the focus of this brief is the impact of exclusion from business oriented facilities on women because this case dealt with the specific exclusion of women, amici are equally committed to ensuring that all members of minority groups enjoy full access to those important business centers.

<sup>1</sup> See, e.g., Avner and Bacharach, *Let's Make a Deal—When Private Means Business*, N.Y. St. Bar J., Oct. 1985, at 12; Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C.R.-C.L. L.Rev. 321 (1983) ("Burns"); Schafran, *Welcome To The Club! (No Women Need Apply)*, Women and Foundations/Corporate Philanthropy (1981); *The All-Male Club: Threatened On All Sides*, Bus. Wk., August 11, 1980, at 90; Bracewell, *Sanctuaries of Power*, Hous. City Mag., May 1980, at 50; Ginsburg, *Women as Full Members of the Club: An Evolving American Ideal*, 6 Hum. Rts. 1 (1975).

extensive business activity at so-called "private" clubs and organizations.<sup>2</sup> See Part IV B.2 *infra*.

The Duarte Rotary Club seeks to acknowledge the reality of its club's purposes and practices by admitting women who meet Rotary's membership criteria as business and professional leaders in the community. Rotary International, however, resists this change, pretending that it is solely an organization of intimates providing service to the public, has no business purpose, provides no business-related goods or services, and confers no commercial advantage on its members. Rotary's Manual of Procedure and the testimony offered in this and another Rotary case tell a different story—the story of an immense international organization avid for publicity and growth, whose members are chosen for their standing in the business community and are provided with the training and with the access to business leaders worldwide to enhance that standing.

Despite Rotary's protestations, the business advantage conferred upon members of the organization are undeniable, and the loss to business and professional women excluded from its ranks severe. The substantial busi-

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<sup>2</sup> Many targets of these actions have responded to these external pressures and to the urgings of their members by opening their doors to women. In 1986 alone, the University Clubs of Pasadena, California and Providence, Rhode Island, Philadelphia's Union League and the Detroit Athletic Club were among those voting to admit women. *All Male Club of 60 Years Finally Relents*, L.A. Times, June 19, 1986, at 1; *Club in Rhode Island to Let Women Join*, N.Y. Times, June 8, 1986 at 61, col. 1; *Philadelphia Club Drops All-Male Restriction*, N.Y. Times, May 22, 1986, at A.20; *Clubs End Bar to Women*, N.Y. Times, December 31, 1986, at D16, col.2.



ness activities engaged in by Rotary make application of the California Unruh Act a constitutionally valid effort to remove discriminatory barriers to women's full participation in the business, professional, civic and political life of their community.

**B. Application Of The Unruh Act To Rotary International Serves The "Profoundly Important" State Interest Of Ensuring Nondiscriminatory Access To Commercial Opportunities.**

This case requires the court, as in *Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984), to "address a conflict between a State's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization." California seeks to apply the Unruh Civil Rights Act, California Civil Code § 51 ("Unruh Act") to protect the right of women to non-discriminatory access to commercial opportunities. The same objective was deemed to be a "compelling state interest[] of the highest order" in *Jaycees*, 468 U.S. at 624. "Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests." *Id.* at 625-26 (citations omitted). Like Minnesota, California has enacted legislation to further the compelling state interest of assuring women and minorities equal access to the commercial advantages available through membership in "private" clubs and organizations engaged in substantial business activity.

At issue here is California's effort to protect women and minorities from the harm that results from exclusion

from organizations that foster business opportunities for their members.

It has been well documented that exclusive clubs and organizations, like Rotary, afford their members unique opportunities for business contacts and business deals. A study sponsored by the American Jewish Committee revealed that more than half of the corporate executives interviewed believed clubs provided valuable business contacts; over two-thirds reported that such membership adds to one's status in his firm or community. Burns, *supra* note 1, quoting R. Powell, *The Social Milieu as a Force of Executive Promotion* 105 (1969). As the New York City Commission on Human Rights concluded after holding extensive hearings on business-oriented private clubs:

Irrespective of the reasons, major companies, banks, law firms and trade and professional associations routinely use club facilities rather than public accommodations for meetings of all kinds, informal and formal. . . [W]itnesses testified from personal experience that clubs are the preferred setting for scheduled group meetings ranging from the inner circle of a particular firm, to the leaders of an industry, profession or governmental agency, to special events at which prominent persons address a select audience on matters of special or general current interest.

E. Lynton, *Behind Closed Doors: Discrimination by Private Clubs*, A Report Based on City Commission on Human Rights Hearing 15 (1975); see also *Club Membership Practices of Financial Institutions: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. (1979).

In essence, private clubs provide members with an entree to the "Old Boy Network," which provides men

with knowledgeable allies who help them advance in their careers, teach them the cast of characters, and advise them of job openings, and business opportunities. The importance of access to such networks cannot be overestimated. The Detroit Free Press has described the Old Boy Network as "where the power really is . . . the mechanism that gives men a chance to push the right buttons and meet the right people at the right time." O'Brien, *Women Helping Women*, Det. Free Press, Nov. 13, 1978. Promotions and high-level jobs are often based on the personal relationships forged in the closed meetings of private clubs. The Bureau of Labor Statistics reported that almost one-third of all jobs men hold come through personal contacts. Bureau of Labor Statistics, U.S. Dept. of Labor, *Job Seeking Methods used by American Workers*, Table 3 (1972). Most people believe the percentage is even higher for high-level positions. C. Kleiman, *WOMEN'S NETWORKS 2* (1980).

Women need the access to career enhancing networks as much as, or more than, men. Despite the gains that women have made in the job market in the last 20 years, they have not attained the same professional status as their white male colleagues. For example, although women now fill nearly one-third of all management positions, most are in jobs which command little authority and relatively low pay. Hymowitz & Schellhardt, *The Glass Ceiling*, Wall St. J., March 24, 1986, at 1D, col. 1. Only two percent of the top executives surveyed in 1985 were women. *Id.*, col. 2. A recent survey of 1,362 senior executives in positions just under chief executive rank at the nation's largest companies found only 29 women. *Why Women Executives Stop Before The Top*, Newsweek, (December

29, 1986/January 5, 1987), at 72. Moreover, women hold only three to four percent of Fortune 1000 directorships. Ansberry, *Board Games*, Wall St. J., March 24, 1985, at 4D, col. 1.

Aspiration, drive and talent simply are not enough for women seeking to equal the professional accomplishments of their male counterparts. Women need the informal contacts, networking, and professional support that membership in private clubs, such as Rotary International, offer. See Bartlette, Poulton-Callahan & Somers, *What's Holding Women Back*, Management Weekly, Nov. 8, 1982; Hollingsworth, *Sex Discrimination in Private Clubs*, 29 Hastings L.J. 417, 421 (1977) ("The exclusion of a segment of the population from such private clubs works to severely limit the economic mobility of that segment"); Bell, *Power Networking*, Black Enterprise 111 (Feb. 1986) ("[T]o be truly successful, you have to become a part of the internal, often invisible, old boy network, too").

These clubs often argue that they are not commercial establishments. In fact, most men-only clubs, including Rotary, serve to promote business activity of every conceivable kind. For example, the President of the Bar Association of San Francisco recently conceded that important legal business, both commercial and professional, is transacted at private clubs, stating: "The exclusion of women and minorities [from private clubs] operates as an impediment to their full participation in the legal profession." *"Male" Clubs: Bar Leaders are Members*, The Recorder, July 22, 1986.

Membership in a "service" club like Rotary is often a prerequisite for those who want to be successful in the

business and political world, particularly in small communities like Duarte. During the debate over the adoption by the California Judges Association of an ethics rule barring judges from belonging to discriminatory clubs, one judge candidly termed membership in service organizations like Rotary "an electoral necessity"; another judge admitted that he owed his election to belonging to Kiwanis and the Elks Club. Jost, *Judges Make Private Clubs a Public Wrong*, L.A. Daily J., Sept. 22, 1986, at 2, col. 4. In the proceedings below, Jacob Frankel, president of California State College at Bakersfield, testified that Rotary membership was essential for a college president to raise funds; all members of his cabinet were encouraged to join Rotary as part of their jobs. (R.T. 70). [Jt. App. 34].

Besides depriving women and minorities of access to professional development, discriminatory business-related clubs have other negative ramifications as well. They perpetuate the treatment of women and minorities as second-class citizens. As two women law professors testified before the United States Senate:

The existence of such clubs today is evidence that there are still many who think that minorities are not fit persons with whom to associate. The exclusion of women from private clubs delivers a different but no less offensive message. It, too, is a reminder that the legal, political, and economic role assigned to women throughout most of our history was a quite restricted one.

Barbara Allen Babcock & Herma Hill Kay, Statement Submitted to the United States Senate Committee on the Judiciary, June 23, 1979, at 1-2.

Society also suffers when women and minorities are excluded from the opportunities presented by membership in business-oriented clubs and organizations. This Court has often condemned discrimination based on arcane and stereotypical assumptions about the relative needs and capacities of the sexes or races that bear no relationship to the actual ability of individuals. See *Jaycees*, 468 U.S. at 625; see also *California Federal Savings & Loan Ass'n v. Guerra*, — U.S. —, slip. op. at 8 (1987). Not only does the exclusion of women and minorities from discriminatory clubs demean an enlightened society by its implicit denigration of their worth and abilities, but it also tangibly injures the commercial and non-commercial foundation of our nation by depriving us of their full contribution. See generally, *Jaycees*, *supra*.

Numerous organizations and entities have recently recognized the negative effect of discriminatory membership policies on women and minorities and have enacted measures designed to prohibit such practices. For example, in 1986, both the Bar Association of San Francisco and the California State Bar Board of Governors adopted resolutions urging law firms and corporate legal departments to refrain from scheduling meetings or reimbursing dues or expenses at such clubs. *California Lawyers Move on All-Male Clubs*, N.Y. Times, Aug. 31, 1986, at 35A, col. 1. The Bar recognized that "continued adherence to those policies and practices imposes an unfair and arbitrary professional disadvantage on those members of the [Bar] Association who are subjected to discrimination . . ." San Francisco Bar Ass'n. Resolution, adopted June 11, 1986. The California Judges Association amended its judicial code of ethics and the Judicial Conference of the United States



amended the commentary to Canon 2 of its code of Judicial Conduct to declare that it is "inappropriate" for members of the judiciary to belong to discriminatory clubs. Hager, *Judges Vote to Avoid Discriminatory Clubs*, L.A. Times, Sept. 16, 1986, at 1, col. 2.

Further, the American Bar Association, the State Bar of New York, American Jewish Congress, the Council on Foundations and such academic institutions as Columbia University, the University of Minnesota and the University of Southern California prohibit their committees, sections and staffs from holding meetings and other official functions at clubs that discriminate.<sup>3</sup>

Among corporations, ARCO, Michigan Consolidated Gas Company, CBS, IBM, The New York Times and Bank of America no longer pay for their employees to be members of such clubs nor reimburse business expenses incurred there.<sup>4</sup>

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<sup>3</sup> American Bar Association, *The Use of Private Clubs for Association Functions*, adopted October 1978; New York State Bar Association, Resolution adopted January 23, 1981; American Jewish Congress, *Discrimination at Private Clubs, Hotels, etc.*, adopted June 6, 1982; Council on Foundations, *Council Policy on the Use of Private Clubs*, adopted October 19, 1981; Columbia University, *Resolution Concerning University Participation in Clubs with Discriminatory Admissions Policies*, adopted January 23, 1981; Memorandum of President C. Peter McGrath, June 1984, University of Minnesota; USC Transcript, Dec. 2, 1985, at 2.

<sup>4</sup> Memorandum from Lowdrick M. Cook, Chairman and Chief Executive Officer of ARCO to ARCO senior management (May 28, 1986); 2 *Utilities Halt Dues for Detroit Men's Club*, N.Y. Times, February 12, 1986 at 10, Col. 5; CBS Policy, Delegations of Authority, Reimbursable Business

(Continued on following page)



Philadelphia has adopted legislation banning the city from awarding contracts to any company that pays for membership or expenses at such clubs and from reimbursing public officials for expenses incurred at such clubs. Philadelphia Code Ch. 17-400 and Sec. 20-307 (1980). New York City has amended its definition of a public accommodation to include any organization that has more than 400 members, regularly serves meals and regularly receives payments from or on behalf of non-members in furtherance of trade or business. New York City Admin. Code Ch. 1 § 8-102(9) (1984). And, Governor Mario Cuomo has issued an Executive Order barring the conduct of official New York State business at such facilities.<sup>5</sup>

These actions were taken after extensive debate on the policies of private clubs and their discriminatory impact. The conclusions of the states and cities which reviewed the matter were unanimous. All these new policies embodied "a recognition . . . of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Jaycees*, 468 U.S. at 626.

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Expenses, Paragraph 16, adopted January 31, 1981; IBM, Position of Non-Support for Organizations or Service Clubs Which Exclude Persons on the Basis of Race, Color, Sex, Religion or Natural Origin, adopted 1980; *Century Club's Timesmen Stuck With the Tab*, N.Y. Post, December 12, 1983, at 6, col.1; Bank of America, Expense Account Guidelines (1980).

<sup>5</sup> Executive Order No. 17, Governor Mario M. Cuomo, May 31, 1983, "Establishing State Policy on Private Institutions Which Discriminate."

**C. Application of the Unruh Act To Rotary International Does Not Infringe The First Amendment Rights Of Business-Related Clubs and Organizations.**

Application of the Unruh Act to Rotary does not abridge either of the two components of the First Amendment right of association, intimate and expressive, identified in *Jaycees*, 468 U.S. at 618.

**1. Enforcement Of The Unruh Act Does Not Abridge Club Members' Freedom Of Intimate Association.**

In *Jaycees*, this Court explained that the concept of constitutionally protected "freedom of association" actually incorporates two distinct, albeit sometimes coinciding, components. The first, termed the freedom of intimate association, protects "choices to enter into and maintain certain intimate human relationships" against undue intrusion by the State. 468 U.S. at 617-18. This Court has limited the constitutional protection for intimate associations to "the formation and preservation of certain kinds of highly personal relationships." *Jaycees*, 468 U.S. at 618. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage); *Casey v. Population Services Int'l*, 431 U.S. 678 (1977) (childbirth); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (child rearing and education).

In contrast, this Court has consistently refused to confer special status upon those relationships that are removed from the core concept of the home as the province of constitutionally protected privacy. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (court dismissed associational freedom challenge to ordinance preventing six unrelated individuals from living together). See also

*Runyon v. McCrary*, 427 U.S. 160 (1976) (prohibiting racially discriminatory admissions policies of private school "does not represent governmental intrusion into the privacy of the home or a similarly intimate setting").

Upon analysis of those features identified as typical of relationships entitled to the constitutional protection of intimate association—small size, selectivity and exclusivity—this Court in *Jaycees* had no difficulty concluding that the Jaycees organization was "clearly . . . outside of the category of relationships worthy of this kind of constitutional protection." 468 U.S. at 620. No different result can be reached in this case. Rotary is an organization of enormous size, with an intense concern with growth and publicity, whose members associate with hundreds of thousands of Rotarians worldwide. It allows the participation of non-members in most Rotary events, provides business training and opportunities to its members, and bases its selection system on business attributes. Given these factors, Rotary's members do not have any intimate association to protect.

(a) *Size*. In August 1982, Rotary had 907,750 members making it three times the size of Jaycees. Appellants repeatedly state that the average club membership is only 46. (App. Brief at 7). Yet, this average is even larger than the Jaycees' average chapter. See *Jaycees*, 468 U.S. at 613. Some Rotary Clubs have several hundred members. The Bakersfield, California Rotary Club, for example, has 200 members. (Jt. App. at 34). A club in the Seattle area has over 750 members. *Rotary Club of Seattle-International District v. Rotary International* (W.D. Wash. No. C86-1475M) Hough Decl. ¶¶ 3, 4.

Moreover, Rotary members do not associate only with the members of their own club. Rotary requires members to attend meetings every week wherever they may be. (Rotary Basic Library, Vol. 1 at 67-69). [Jt. App. at 84-85]. Members are thus in association in varying degrees with the more than 900,000 Rotarians worldwide.

Further, Rotary is engaged in the assiduous pursuit of growth. Rotary's Manual of Procedure gives explicit directions to each club to recruit new members and maintain a constant "pattern of growth" (1981 Manual of Procedure at 92-99, 134-46) [Jt. App. at 49-54, 61-67]; the "Public Relations" section of the Manual directs each club to have a public relations committee which is to use every possible method to keep Rotary's name before the public to attract new members. 1981 Manual of Procedure at 166-68. [Jt. App. at 70-73]. Rotary's success in achieving growth is evident; membership stood at 907,750 members in 19,788 clubs when this suit commenced in 1982; today there are 1,021,624 members in 22,470 clubs. *Vital Statistics*, 150 *The Rotarian*, No. 1, January 1987, at 41. This avid appetite for growth is incompatible with concepts of intimacy and seclusion.

(b) *Selectivity*. Rotary particularly argues that it is distinguishable from Jaycees because Rotary has a "selective" membership policy.

One repeatedly stated criterion for what makes a club private is that members not only be selected, as opposed to admitted wholesale, but that "membership is determined by subjective, not objective criteria." *In Re U.S. Power Squadrons*, 59 N.Y. 2d 401, 452 N.E. 2d 1199,

465 N.Y.S.2d 871, 876 (Ct. App. 1983); *Wright v. Cork Club*, 315 F.Supp. 1143, 1153 (S.D. Tex. 1970).

Contrary to this standard of subjectivity, Rotary's "selectivity" is premised on objective business-related criteria. Rotary's selection process uses a business classification system, selecting members as representatives of their business or profession. (App. Brief at 7). When a new member is proposed, the classification committee first ascertains that the proposed member holds a leadership position in "an open classification of business or profession." (*Id.* at 8). "The membership committee evaluates the candidate from the standpoint of character, *business* and social standing." (App. Brief at 8, *emphasis supplied*).

Thus, Rotary's selection system is thoroughly tainted by commercialism, which is enough to undermine its claim to a right of intimate association and justify the state's interest in ensuring nondiscriminatory access to the commercial opportunities available in Rotary. Furthermore, requiring Rotary to consider the admission of women on their merits will not deprive the organization of its right to choose members for their business/professional affiliations or for their congeniality. Application of the Unruh Act will only bar the wholesale exclusion of women and minorities on invidious discriminatory grounds. Such grounds are not entitled to constitutional protection.

(c) *Publicity*. Another criterion which has been mentioned in lower court cases in determining whether an organization is "private" is whether its publicity is aimed solely at its own members. See *In Re U.S. Power Squadrons*, *supra*; *Wright v. Cork Club*, *supra*. Rotary's Manual of Procedure reveals a virtual obsession with directing

publicity to the public and keeping Rotary constantly in the public eye. The Manual of Procedure directs clubs' public relations committees "to take a comprehensive approach to public relations" and "to utilize newspapers, radio, television, magazines and firms in telling the Rotary story." 1981 Manual of Procedure at 166-67. [Jt. App. at 70-72].

Rotary's constant attention to publicity is another means by which it confers a business advantage on its members, who are regularly brought into the public eye with both their Rotarian status and business classification identified. Like its appetite for growth, Rotary's appetite for publicity is antithetical to any meaningful concepts of intimacy and seclusion.

(d) *Involvement of Non-Members.* Rotary's claim that its clubs "have well defined policies restricting participation to members" (App. Brief at ii) is belied by its Manual of Procedure. Individual members are urged to make "a special effort" to invite guests to weekly meetings "in order that non-Rotarian members of the community may be better informed about the function of the Rotary Club and its aim and objects." 1981 Manual of Procedure at 35. [Jt. App. at 39]. Like Jaycees, Rotary conducts a wide range of community service projects in which members of the public of both sexes and other organizations participate. *Id.* at 42-47. [Jt. App. at 40-45]. Further, non-Rotarians are invited to speak at business relations conferences (Rotary International No. 540) [Jt. App. at 14-17] and international conventions. 1981 Manual of Procedure at 54. [Jt. App. at 45].

Appellants urge that, unlike Jaycees, Rotary has no women's affiliates, so that to introduce women into Rotary

would be a sharp break with tradition. Yet, the Manual of Procedure specifically commends the "fine work" performed by "ladies committees or other associations composed of women relatives of Rotarians cooperating with and supporting them in service and other Rotary club activities." *Id.* at 47. [Jt. App. at 44-45]. A recent Rotarian article names these groups as the Rotary Anns, Inner Wheel and Las Damas de Rotary. Uhlig, *Do Women Belong in Rotary?* No, 150 *The Rotarian* at 15 *et seq.* (January 1987). Thus, members of the public, including women, are regular participants in Rotary activities.

(e) *Purpose.* One of the most salient factors in analyzing an organization's ability to claim the protection of freedom of intimate association is its purpose. If the foundation and focus of an association is to any substantial extent commercial or professional, as is Rotary's, then that association does not possess the requisite attributes of intimacy to bring it within the relationships entitled to special constitutional consideration.<sup>6</sup> Although Rotary engages in a variety of community service projects, service to the public is only one of its purposes. Rotary's Basic Library states that Rotary's founder, Paul Harris, "had an idea that friendship and business could be mixed and that doing so would result in more business and more friendship for everyone involved." (Rotary Basic Library, Vol. 3, Vocational Service, at 5). [Jt. App. at 89].

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<sup>6</sup> Appellants persist in citing the trial court opinion to the effect that the business benefits of Rotary membership are "incidental to the [association's] principal purposes," (App. Brief at 29 (quoting from Jt. App. B-3)), even though the Court of Appeal ruled that "finding" was not supported by the evidence and is therefore of no import under California law. See Jt. App. C-26.



Concern for members' business success continues to be a prime feature of Rotary activities. Rotary International No. 540, describing Rotary "Business Relations Conferences," states:

One of the most satisfying vocational service programs for the Rotarian is the business relations conference. The Rotarian learns management techniques that help improve his own business or professional skills. He receives the inspiration of discussing business problems with experts in his own or related fields.

[Jt. App. at 14]. The Manual of Procedure, under "Business Advice and Assistance to Rotarians", urges each club to establish committees to provide confidential business advice for members and to hold "clinics" for members to discuss problems of an economic nature. 1981 Manual of Procedure at 38. [Jt. App. at 40].

The trial court record disclosed that Rotary members often deduct their dues as a business expense or obtain reimbursement from their employers. At least three witnesses testified that either their employers paid their dues (R.T. 20, 32, 69) or that the Internal Revenue Service allowed the deduction during income tax audits. (R.T. 4, 20). A former treasurer of the Bakersfield Rotary Club testified that, out of the club's 200 members, the dues of all but eight or ten were paid by their companies or businesses. (R.T. 70).

Deduction of members' dues and club-related expenses in private clubs is pervasive. One survey found that 58% of the banks and 53% of the savings and loan associations contacted regularly paid membership dues in private organizations for their executives. Burns, *supra*, 18 Harv. C.R.-C.L. L. Rev. at 329, n.22. A recent compre-

hensive survey of executive perquisites showed substantial percentages of each of the seven industry groups studied paying for luncheon and supper club dues for one or more management levels. Executive Compensation Services, Inc., Executive Perquisites Report 1986/87 (1986) at 66-69. In 1980, the National Club Associations estimated that fully half of the approximately 300,000 federal contractors paid or reimbursed certain dues or expenses of their employees at private clubs. Comments of the Nat'l Club Ass'n. Re Regulations Proposed By the Dept. of Labor, Office of Federal Contract Compliance Programs, Dealing With Payments By Federal Contractors to Private Organizations (March 24, 1980). Many law firms reimburse lawyers for dues and, even those that do not, repay client entertainment charges spent at such clubs. See *"Male" Clubs: Bar Leaders are Members*, The Recorder, July 22, 1986. The extent of this practice can best be seen in a letter sent by the former president of New York City's University Club to its membership: "A recent analysis of dues and expense payments showed that nearly 40% of receipts were paid by checks drawn on business accounts: this is only part of the total since many persons pay on their own account and then obtain reimbursement from employers." Letter of J. Wilson Newman (March 30, 1981) Testimony of the New York City Comm'n. on the Status of Women in Support of Intro. 513 Before the General Welfare Comm., (July 30, 1980). The National Club Association reported that 37% of city clubs' and 26% of country clubs' total income came from company paid memberships. *The All-Male Clubs: Threatened on all Sides*, Bus. Wk., August 11, 1980, at 90.

Such practices clearly contradict any argument that clubs like Rotary are purely social organizations since each

deduction constitutes a representation to the government that club activities are business-related. The federal Internal Revenue Code provides that only "the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" may be deducted from income taxes. 26 U.S.C. § 162. For the deduction to be allowed for a club-related expense, federal tax regulations further require that a club be used for business purposes at least 50% of the time. Treas. Reg. § 1.274-2(e)(4)(iii) (1982). Treating club-related expenses as a business deduction is thus *prima facie* evidence that membership serves a business purpose or confers a professional advantage.

Thus, the Court of Appeals properly concluded:

The evidence simply does not support the trial court's finding that the business advantages are merely incidental. By limiting membership in local clubs to business and professional leaders in the community, International has in effect provided a forum which encourages business relations to grow and which enhances the commercial advantages of its members.

*Rotary Club of Duarte v. Directors of Rotary International*, 178 Cal.App.3d 1035, 1058, 224 Cal.Rptr. 213 (1986).

When the indicia of intimate association—size, selectivity, publicity, seclusion, and purpose—are examined, it is clear that Rotary does not merit the protection of a right of intimate association.

## **2. Enforcement Of The Unruh Act Does Not Abridge Club Members' Freedom Of Expressive Association.**

The second aspect of the constitutional right of association identified in *Jaycees* is the "freedom of expressive

association.” 468 U.S. at 622. Rotary International and its individual club members cannot claim immunity from California’s anti-discrimination law by relying on this component of freedom of association.

**a. Rotary International And Its Members Cannot Claim The Protection Of The Constitutional Right Of Expressive Association.**

The right to associate for expressive purposes, while not itself explicitly guaranteed by the Constitution, is a necessary concomitant of an individual’s liberty to engage in protected expressive activities. 468 U.S. at 622. As such, the right applies only to those organizations whose purpose for associating is “the advancement of beliefs and ideas.” *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Appellants’ theory of freedom of association would uproot the right to expressive association from its First Amendment moorings. Rotary claims constitutional immunity from California’s anti-discrimination law for an organization whose primary purposes and activities are commercial rather than expressive. Under the circumstances, acceptance of appellants’ claim of free association would trivialize and even denigrate the First Amendment’s protection of free expression.

Discriminatory conduct is not entitled to constitutional protection simply because it is practiced by a group, rather than by individuals. Rather, the Court must first determine whether Rotary’s activities can appropriately be characterized as protected expression. *See Jaycees*, 468 U.S. at 635-36; *see generally*, L. Tribe, *Constitutional Law* §§ 12-23, at 702 (1978) (defining the First Amendment freedom of association as “a right to join with others

*to pursue goals independently protected by the First Amendment—such as political advocacy, litigation (regarded as a form of advocacy), or religious worship”*) (footnotes omitted) (emphasis in original).

Groups whose activities are not inherently expressive have received mixed treatment. For example, in *NAACP v. Button*, 371 U.S. 415, 429-30 (1963), the Court struck down a state statute restricting the associational freedom of a law firm engaged in “political expression” to achieve social goals. Yet, a law firm engaged in an ordinary commercial practice is afforded no special First Amendment associational protection. See, e.g., *Hishon v. King and Spaulding*, 467 U.S. 69 (1984); see also *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 459 (1978) (“A lawyer’s procurement of remunerative employment is a subject only marginally affected with First Amendment concerns”).

The right of free speech is at the heart of the Court’s willingness to extend constitutional protection to an association’s internal affairs. Accordingly, Rotary can claim special First Amendment protection under the banner of freedom of association only if it can show that it truly has the purpose of advancing beliefs or ideas. No such showing can be made here. There is no indication in the record, and no suggestion in Appellants’ brief, that protected expression is even an “insubstantial part” of Rotary’s purposes and activities.

Moreover, like the Jaycees, Rotary has chosen to “enter[] the market place of commerce in a[] substantial degree,” and, in so doing, it has forfeited “the complete control over its membership that it would otherwise

enjoy if it confined its affairs to the marketplace of ideas.” *Id.* at 636. (O’Connor, J., concurring). As the previous sections demonstrate, Rotary has a commercial purpose and engages in substantial business activity. Accordingly, the Court should not allow Rotary’s sweeping invocation of associational freedom to insulate it from coverage under California’s anti-discrimination law.

**b. Enforcement Of The Unruh Act Would Not Interfere With Any Expressive Purposes Of Activities Of Rotary International And Other Business-Related Clubs.**

Even if Rotary and other business-related clubs engaged in activities that invoked the protection of the First Amendment right of expression, Rotary “ha[s] failed to demonstrate that [the Unruh Act] imposes any serious burdens on the male members’ freedom of expressive association.” *Jaycees*, 468 U.S. at 626. In particular, there is “no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability to engage in [] protected activities or to disseminate its preferred views.” *Id.* at 627.

There is no conceivable ground for positing that the consideration of women for membership in Rotary would somehow interfere with the organization’s stated objective: to “provide humanitarian service, encourage high ethical standards in all vocations and help build goodwill and peace in the world.” 1981 Manual of Procedure, at 7. [Jt. App. 35]. Rendering civic services and responding to community needs do not in any way require a single-sex membership. To the contrary, the record established that many Rotary clubs, with the encouragement of Rotary International, seek the close cooperation and support of women in their service and other club-related activities,



even establishing auxiliary women's committees for this very purpose. *Id.* at 47. [Jt. App. 44-45].<sup>7</sup> Cf. *Jaycees*, 468 U.S. at 627. (participation of women in many of Jaycees' activities dispels claim that admission of women will impair organization's symbolic message). In short, as in *Hishon v. King & Spaulding*, 467 U.S. at 78, appellant "has not shown how its ability to fulfill such a function would be inhibited by a requirement that it consider [a women] for [membership] on her merits."<sup>8</sup>

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<sup>7</sup> This is typical of most of the so-called "private" business clubs and service organizations throughout the country. Women are often allowed (and sometimes encouraged) to participate in the club's activities as wives, guests or affiliates, while being denied the commercial opportunities and advantages that first-class membership would provide.

<sup>8</sup> Rotary International and other clubs cannot shield themselves from application of the Unruh Act by claiming that a belief in its male-only membership policy is one of the fundamental tenets of the organization, and hence is itself protected expression. This essentially is the contention raised by *amicus* Conference of Private Organizations, which asserts, however implausibly, that the male-only policy is the *sine qua non* of membership for many Rotarians. (See Brief of the Amicus Curiae in Support of Appellants by the Conference of Private Organizations, at 12-15.) Not only is such an argument unsupported by the record, but it confuses the right to *promote* a particular belief—which is generally protected under the First Amendment—with the right to *practice* that same belief—which does not always enjoy constitutional protection. This distinction was the basis for this Court's holding in *Runyon vs. McCrary*, *supra*, that radically discriminatory admission practices of private nonsectarian schools were unlawful under 42 U.S.C. § 1981.

It is conceivable, perhaps, that for some types of organizations, such as the Ku Klux Klan, the expressive content of its discriminatory membership criteria is so intimately tied to the very purposes, beliefs, and pronouncements of the organization, that government regulation of its membership criteria would constitute an infringement on its freedom of expression. But that is certainly not the situation here.



Indeed, Rotary International does not really contend that requiring local clubs to consider women for membership would interfere with the achievement of any of the organization's commendable service objectives. Rather, it asserts only that admitting women to membership in local California clubs, as the Duarte chapter desires to do, "would comprise a material interference with deeply felt choices of association preference of many Rotarians." (App. Brief at 34.)<sup>9</sup> Yet, this Court has time and again rejected any notion that the First Amendment right of expressive association protects the social preferences of an organization's members, at least when those preferences demand the exclusion of an entire category of individuals based solely on their race or sex. *Norwood v. Harrison*,

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<sup>9</sup> Rotary also contends that requiring it to permit local clubs to admit women "would risk a material and harmful disruption of the cooperative integrity of Rotary" due to its dependence on "a delicate balance of divergent attitudes in diverse cultures." (App. Brief, at 34.) Aside from the fact that the Court of Appeals concluded as a matter of state law that the evidence did not support a finding that the admission of women into the Duarte chapter "would cause the downfall of the District or International or seriously interfere with Rotary's objectives" (Jt. App. C-26), the desire to appease the "divergent attitudes in diverse cultures" cannot justify unlawful acts of discrimination. When Rotary International conducts its operations in the United States and the State of California, it subjects itself to the laws of those "cultures." The "attitude" of the law in this country is that women are not to be denied equal access access to commercial opportunities and advantages. See generally *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981) ("Though the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, [a rule permitting foreign customer preferences to qualify as a BFOQ under Title VII] would allow other nations to dictate discrimination in this country."); *Abrams v. Baylor College of Medicine*, 581 F.Supp. 1570 (S.D. Tex. 1984).

413 U.S. 455 (1973), accord, *Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976).

In sum, application of the Unruh Act to Rotary works no infringement on the organization's or its members' freedom of expressive association. Like the Minnesota law at issue in *Roberts*, the Unruh Act "Requires no change in the [Rotary's] creed . . . , and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Jaycees*, 468 U.S. at 627. Accordingly, there is no First Amendment violation in this case.

**c. Any Intrusion On Rotary's Or Its Members' Freedom Of Expressive Association Is Outweighed By The Compelling State Interest In Ensuring Non-Discriminatory Access To Commercial Opportunities In Our Society.**

This Court has often admonished that, however valued the right to associate for expressive purposes may be, it is not absolute. Rather, "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Jaycees*, 468 U.S. at 623. (citations omitted). As discussed in Part IVB, *supra*, the Unruh Act—and its application to Rotary International in this case—"plainly serves compelling state interests of the highest order." *Id.* Here, as in *Jaycees*, to the extent that application of the Unruh Act creates any burden on Appellants' right to associate, that impact is no greater

than is necessary to achieve the state's goal of eradicating discrimination. *Id.* at 624.<sup>10</sup>

As discussed above, the law makes no attempt to interfere with, and has no impact upon, the purposes and activities of the Rotary organization. It demands only that women be given the same opportunity as men to join Rotary, that blacks be given the same opportunity as whites to benefit from the commercial services and advantages that membership in Rotary provides. The law seeks only to remove an artificial barrier to membership that bears no relationship to any legitimate functions or objectives of the organization. As such, the Unruh Act “‘responds precisely to the substantive problem which legitimately concerns’ the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose.” *Jaycees*, 468 U.S. at 629 (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)).

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<sup>10</sup> Rotary International contends that the state's interest in eliminating discrimination is not sufficiently compelling because Rotary is not engaged in the distribution of “publicly available goods, services and other advantages.” See App. Brief at 26-36. Rotary's attempt to distinguish this case from that in *Jaycees* by contrasting its allegedly selective availability of advantages with *Jaycees'* references to publicly available goods and services is misplaced. This Court's use of that phrase was occasioned by the language and breadth of Minnesota's Human Rights Act, which makes specific reference to “publicly available” goods, services, etc. in defining the scope of its coverage. See Minn. Stat. § 363.03, subd. 3 (1982) (quoted at 468 U.S. at 615).

## V.

## CONCLUSION

California's compelling interest in eliminating discrimination in the availability of commercial opportunities outweighs any freedom of intimate or expressive association held by Rotary, especially given the substantial business activities engaged in by Rotary and the substantial commercial advantages available to its members. Amici therefore submit that this Court should affirm the decision below.

Respectfully submitted,

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**APPENDIX**

**AMICI'S STATEMENT OF INTEREST**

*American Jewish Committee* ("AJC") is a national organization of approximately 50,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. AJC believes this goal can best be accomplished by helping to preserve and promote the constitutional rights of all Americans. Specifically, AJC supports equal rights under the law for women and is committed to the elimination of gender-based discrimination. AJC appeared before this Court as *amicus curiae* in *Roberts v. U.S. Jaycees*, *supra*.

*American Women in Radio and Television, Inc.* (AWRT) is a not-for-profit, national organization of women and men who work as professionals in radio, television, cable, advertising, public relations and closely related fields. With nearly 3,000 members in more than 50 chapters coast to coast, AWRT, established in 1951, is the oldest continuing professional broadcast organization in the nation. Its membership is representative of the wide spectrum of professionals in the electronic media and allied fields and includes station and company owners and managers, writers, producers, directors, account executives, media buyers, lawyers, engineers, on-air talent, editors, researchers, analysts, reporters, artists, and other qualified professionals. The objectives of AWRT, as stated in its Bylaws, are: to work *worldwide* to improve the quality of the electronic media; to promote the entry, development and advancement of women in the electronic media and their allied fields; to serve as a medium of communication and idea exchange; and to become involved in community concerns. AWRT is committed to advancing

## App. 2

the professional development of women in the industry and to providing opportunities for networking among leaders in the industry. AWRT's membership is restricted, as is Rotary's, to business leaders and professionals. However, male members of AWRT are eligible for membership in Rotary International; but AWRT's female members are ineligible solely because they are women. AWRT's female members are denied the commercial and networking opportunities that are available to its male members in Rotary International solely because of their gender.

*California Women Lawyers* ("CWL") is a statewide bar association representing the interests of the approximately 15,000 women lawyers in the State of California. It has both individual members and 24 local affiliates throughout the state. *Women Lawyers' Association of Los Angeles* ("WLALA") is a county-wide bar association affiliated with CWL. The membership of CWL and WLALA includes both male and female lawyers, judges and law students, all of whom are concerned with the legal rights and equal treatment of women. The ability of women to compete effectively in the marketplace has been and is being hindered by their exclusion from discriminatory private clubs and organizations that foster the business goals of their all male, mostly all-white, membership. For this reason CWL took an active role in urging the California State Bar and the California Judicial Council to adopt a resolution and an amendment to the code of ethics, respectively, discouraging participation in private clubs which discriminate on the basis of sex, race or religion.

*Center For Constitutional Rights* ("CCR") was born of the civil rights movement in the South. CCR attorneys



have been active in many of the struggles for equality waged by different groups in our society. CCR attorneys have been involved in cases dealing with employment discrimination, reproductive rights, voting rights and fair housing. Through litigation and public education, CCR has worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos. CCR appeared before this Court as *amicus curiae* in *Roberts v. U.S. Jaycees, supra*.

*Coalition of Labor Union Women* ("CLUW") is a membership organization of labor union women who are interested in improving working conditions and eradicating sex discrimination in all aspects of employment and employment related advancement. CLUW believes that organized and unorganized women are entitled to full participation in all facets of business and civic life. CLUW appeared before this Court as *amicus curiae* in *Roberts v. U.S. Jaycees, supra*.

*Connecticut Womens Educational and Legal Fund* ("CWEALF") is a non-profit public interest law firm specializing in cases of sex discrimination. Since its inception in 1975, CWEALF has represented women in numerous cases, including women seeking equal access to organizations with discriminatory membership policies. CWEALF has also been active in educating women about their legal rights. CWEALF appeared before this Court as *amicus curiae* in *Roberts v. U.S. Jaycees, supra*.

*Equal Rights Advocates* ("ERA") is a San Francisco-based public interest legal and educational corporation specializing in the area of sex discrimination. Since its inception over twelve years ago, ERA has litigated cases

#### App. 4

aimed at the promotion of equality of the sexes under law. ERA has worked to ensure the equal employment opportunity rights of women and the enforcement of state and federal legislation enacted to guarantee women freedom from discrimination. ERA appeared before this Court as *amicus curiae* in *Roberts v. U.S. Jaycees, supra*.

*National Organization For Women* ("NOW") is a national membership organization of 150,000 women and men in over 750 chapters throughout the country dedicated to assuring equal economic, social and political opportunity for all women. Since its founding in 1967, NOW has been the largest feminist membership organization dedicated to combatting sex discrimination and removing barriers to women's full participation in all aspects of American society. NOW participated as *amicus curiae* before this court in *Roberts v. United States Jaycees, supra*. NOW recognizes the importance of equal access for women to organizations like Rotary International which provide business advice and assistance and entry into a network of influential business and community leaders.

The *NOW Legal Defense and Education Fund* ("NOW LDEF") is a not-for-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women, a membership organization of over 150,000 women and men in more than 750 chapters throughout the country.

Because the exclusion of women from clubs and organizations which significantly impact the business and civic life of the community affects far more women than is gen-

erally supposed, this is an issue with which NOW LDEF has been involved for many years. NOW LDEF worked closely with the Minnesota Attorney General over a five year period and filed several *amicus* briefs in the case successfully challenging the sex discriminatory policies of the Jaycees, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). NOW LDEF also represented NOW-NYS when it participated as *amicus* before the New York Court of Appeals in *In re U.S. Power Squadrons*, 59 N.Y.2d 401 (Ct.App. 1983) and is currently before the New York Court of Appeals as *amicus* in *New York State Club Association v. City of New York*, — A.D.2d — (1st Dept. July 31, 1986), both cases dealing with clubs and organizations that discriminate against women.

*Northwest Women's Law Center* ("Law Center") is a non-profit, membership-supported organization based in Seattle, Washington, that seeks to promote the rights of women through law. The Law Center conducts educational and informational referral programs to advise women in the Pacific Northwest of their legal rights. It also sponsors litigation working towards the total elimination of sex discrimination, including the eradication of employment discrimination and of social and legal barriers that deny women full participation in the business and professional world. The Law Center appeared before this court as *amicus curiae* in *Roberts v. U.S. Jaycees*, *supra*, and is currently appearing as *amicus curiae* before the United States District Court for the Western District of Washington in a case highly similar to the case at bar, *Rotary Club of Seattle-International District v. Rotary International*, (W.D. Wash., No. C 86-1475M) (1986).

The *San Francisco Women Lawyers Alliance* is a bar association primarily comprised of women lawyers practicing in the San Francisco Bay Area. The Alliance was formed in great part to advocate on behalf of women in the community. The organization has filed a number of amicus briefs and lobbied for state and local legislation affecting economic and employment opportunities for women. This past year, the Alliance assumed a leadership role in persuading both the Bar Association of San Francisco and the California State Bar Board of Governors to adopt resolutions denouncing the discriminatory membership policies of private clubs.

*Women's Action Alliance, Inc.*, a national non-profit organization, works towards full equality for women by developing educational programs and services that assist women and women's organizations. The issues at stake in this case are critical to that equality which is denied whenever women are barred from full participation in institutions crucial to their development. Women's Action Alliance appeared before this Court as *amicus curiae* in *Roberts v. U.S. Jaycees*, *supra*.

The *Women's Bar Association of the State of New York* ("WBASNY") is a statewide membership organization of more than 2,500 female and male lawyers, law graduates, and law students committed to the goal of advancing the status of women under the law, in the workplace, and in all fields of human endeavor. In support of this goal, WBASNY has participated in cases which seek to secure women's rights under the law and to remove the barriers which prevent women from achieving their full potential in society. Among the barriers which WBASNY seeks to eliminate is women's exclusion from

clubs and organizations important to the business and civic life of the community. In support of that goal, WBASNY participated before this Court as an *amicus* in *Roberts v. U.S. Jaycees*, *supra*, and has appeared before the New York Court of Appeals as an *amicus* in *In re United States Power Squadrons v. State Human Rights Appeal Board*, *supra*, and *New York State Club Association v. City of New York*, *supra*, both cases dealing with clubs and organizations that discriminate against women.

*Women Employed* is a Chicago-based organization with a membership of 3,000 women workers. Over the past nine years, the organization has assisted working women with problems of sex discrimination. Women Employed also monitors the enforcement, actions and policies of the EEOC and Office of Federal Contract Compliance Programs with regard to a broad range of sex discrimination issues. Women Employed appeared before this Court as *amicus curiae* in *Roberts v. U.S. Jaycees*, *supra*.

*Women's Equity Action League* ("WEAL") is a national non-profit membership organization specializing in economic issues affecting women, and sponsors research, education projects, litigation and legislative advocacy. WEAL is committed to the full and effective enforcement of anti-discrimination laws at both the federal and state levels, to assure that all economic opportunities are available to women as well as men. Women's Equity Action League appeared before this Court as *amicus curiae* in *Roberts v. U.S. Jaycees*, *supra*.

*Women in Business* ("WIB") was created originally to provide a network through which successful women would have the opportunity to encourage, enlighten, and



support one another's professional endeavors. A small group of successful women began to meet to share power concepts, mutual concerns, and successes and to examine the need for affiliation and collaboration with their peers in the business world. WIB was officially incorporated in March 1976. Today the membership of WIB is comprised of more than 250 prominent, influential Los Angeles women in the corporate and business worlds, with representation from academia, politics, government, the arts, sports and science.

*Women's Law Project* ("WLP") is a non-profit feminist law firm dedicated to eliminating sex discrimination through litigation and public education. Since its founding in 1973, WLP has been concerned with institutional barriers to the advancement of women at all levels of participation in society. WLP has represented women seeking admission to all male educational institutions and community organizations, and strongly believes that participation in such organizations is fundamental to the ability of women to compete equally in business and community life. Women's Law Project appeared before this Court as *amicus curiae* in *Roberts v. U.S. Jaycees*, *supra*.

*Women's Legal Defense Fund* ("WLDF") is a non-profit, tax-exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, opera-

tion of an employment discrimination counselling program, and public education. WLDF's experience and knowledge—gained from its members who, as professionals, are disadvantaged by discriminatory membership policies and from its clients who are similarly disadvantaged by exclusion from community and business organizations—have demonstrated that such exclusionary policies result in a diminution of employment opportunities. Women's Legal Defense Fund appeared before this Court as *amicus curiae* in *Roberts v. U.S. Jaycees*, *supra*.



No. 86-421

Supreme Court, U.S.  
**E I L E D**

**JAN 28 1987**

JOSEPH E. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1986

BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,

*Appellants,*

v.

ROTARY CLUB OF DUARTE, et al.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

BRIEF OF THE STATES OF MINNESOTA,  
CONNECTICUT, ILLINOIS, LOUISIANA,  
NEW JERSEY, OHIO, OREGON, TEXAS,  
UTAH AND WISCONSIN AS AMICI CURIAE  
IN SUPPORT OF APPELLEES

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IN THE  
**Supreme Court of the United States**

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ON APPEAL FROM THE COURT OF APPEALS OF THE  
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BRIEF OF THE STATES OF MINNESOTA,  
CONNECTICUT, ILLINOIS, LOUISIANA,  
NEW JERSEY, OHIO, OREGON, TEXAS,  
UTAH AND WISCONSIN AS AMICI CURIAE  
IN SUPPORT OF APPELLEES

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**STATEMENT OF INTEREST**

The Amici States, through their Attorneys General, respectfully offer this brief in support of appellees. The Amici States have enacted legislation designed to eradicate discrimination against their female citizens in public establishments.<sup>1</sup> These statutes are designed to remove barriers to economic advance-

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<sup>1</sup> See, e.g., Minn. Stat. § 363.03, subd. 3 (1986).

ment and political and social integration that have historically plagued women. The enforcement of a male-only membership rule by the international parent organization of approximately 20,000 Rotary Clubs, whose membership recruitment is not highly selective, whose members enjoy business contacts and various commercial programs and which encourages attendance by non-members, undermines the states' interest in eradicating discrimination against its female citizens.

## SUMMARY OF ARGUMENT

This Court, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), recognized both "intrinsic and instrumental" features of constitutionally protected freedom of association. *Id.* at 618. The intrinsic aspect secures certain intimate human relationships against undue state intrusion. The instrumental aspect seeks to preserve First Amendment liberties by recognizing an associational right for the purpose of engaging in speech, assembly, petition for the redress of grievances, and the exercise of religion. *Id.* Neither the intrinsic nor the instrumental aspects of appellants' right to association are impaired by the decision below under the guiding principles of *Roberts*. As to freedom of intimate association, Rotary International resembles a large business organization far more than it resembles the intimate personal relationships entitled to constitutional protection. Furthermore, the membership of local Rotary clubs is drawn from a broad cross-section of the local community and is not highly selective. As to freedom of expressive association, the judgment below does not impair the ability of Rotary International or its constituent clubs to express their views, and any minimal impairment that may result is justified by California's compelling interest in eradicating discrimination by business establishments against its female citizens.

## ARGUMENT

### I. APPELLANTS FREEDOM OF INTIMATE ASSOCIATION IS NOT IMPAIRED BY THE JUDGMENT BELOW.

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court reaffirmed its recognition that “certain kinds of highly personal relationships” must be afforded “a substantial measure of sanctuary from unjustified interference by the State.” *Id.* at 618. The kinds of highly personal relationships afforded such protection are characterized

by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection.

*Id.* at 620.

In determining the limits of the states’ authority to interfere with freedom of intimate association, the Court has indicated it will make “a careful assessment of where that relationship’s objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.” *Id.* The relevant factors may include “size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.” *Id.*

Several features of the Rotary organization place it well within the “most attenuated” end of the spectrum of personal



attachments. The first pertinent characteristic is the structure and size of the Rotary organization whose stated purpose is to "provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." Jt. App. at 35. Rotary International is a worldwide association of 19,788 local clubs in 157 countries. It has no human members; only local Rotary clubs are members. Appellants' Brief at 7. Such a far-flung, large association of organizations is hardly among those "highly personal relationships" deserving of constitutional protection from state interference. As appellants note, "[t]he constitutional right to freedom of association belongs in the first instance to an individual." Appellants' Brief at 22.

Second, the commercial focus of the Rotary organization "seems remote from the concerns giving rise to this constitutional protection." *Roberts*, 468 U.S. at 620. Rotary International has an international staff of 350 persons, publishes an official magazine received by nearly one-half million readers, and receives license fees and annual royalties on sales of merchandise permitted to bear the Rotary emblem. *Rotary Club of Duarte v. Board of Directors of Rotary International*, 224 Cal. Rptr. 213, 222-24 (Cal. Ct. App. 1986). A club member is not merely an individual, but also "the representative of his vocation in that community." Jt. App. at 22 (emphasis in original). Rotary clubs sponsor business relations conferences where "[t]he Rotarian learns management techniques that help improve his own business or professional skills." *Id.* at 14. A Rotary vocational service program is designed to "create understanding within and between the various occupations in the community and ensure improved ethical and practical relations among them." *Id.* at 22. The study of "actual business problems" by Rotarians is encouraged. *Id.* at 24. The "adop-

tion of codes of correct practices by trade associations" is encouraged by some Rotary Clubs. *Id.* at 28. Rotarians exchange "confidential business advice and assistance." *Id.* at 40.

Two additional factors that counter appellants' invocation of freedom of intimate association are the minimally selective recruitment procedure of Rotary clubs and non-private nature of Rotary club meetings. The active membership of each club is based on having, in general, at least one representative of each business or profession within the community. Appellant's Brief at 7. As Rotary acknowledges, "[t]his would seem to be a restrictive provision, but its purpose is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross-section of the business and professional life of the community." *Jt. App.* at 84. Business and activity classifications are numerous, often based on the classified pages of the local telephone directory. *Id.* at 37. The classifications can, for membership recruitment purposes, be subdivided into specialties, such as automobile insurance, fire insurance, casualty insurance, etc., *id.* at 87, thus assuring a vast public pool of potential members that constitutes, in the view of Rotary, "a true cross-section—a microcosm—of the business and professional life" of the community. *Id.* at 86. There is no limit to the size of a local Rotary club, at least one of which has 900 members. Appellants' App. at G-60. Rotary International advises its member clubs that they may hold joint meetings with other service clubs and encourages club members to invite non-Rotarians to attend meetings. *Jt. App.* at 25, 39, 66. Women relatives of Rotarians are commended by Rotary International for supporting Rotary club activities. *Id.* at 44-5. Finally, the time, date and place of Rotary meetings are publicized by news releases prepared for distribution to news

media. *Id.* at 95-6. Thus, the Rotary organization recruits its membership from a significant portion of the general public and thrives on public attention.

The large size and commercial aspects of the Rotary organization, its minimally selective membership recruitment, its invitation to attendance by non-members, the support it welcomes from non-member women and its efforts to publicize its meetings, places the Rotary organization at a point "remote from the concerns giving rise to this constitutional protection [of freedom of intimate association]." *Roberts*, 468 U.S. at 620. The associations sought to be protected by appellants are not distinguished by "smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* This Court has accorded constitutional protection only to a narrow range of highly personal intimate associations, such as marriage, precisely because they are "not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). To accord appellants such a protection would mark a major departure for this Court by greatly expanding the kinds of associations accorded the constitutional protection of freedom of association.

Whatever satisfying personal relationships individual Rotary club members may derive from their membership, Rotary International and its constituent clubs "lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women." *Roberts*, 468 U.S. at 621.

## II. APPELLANTS' FREEDOM OF EXPRESSIVE ASSOCIATION IS NOT IMPAIRED BY THE JUDGMENT BELOW.

The freedom of expressive association seeks in part to prevent the state from unjustifiably interfering "with the internal organization or affairs of the group." This restriction on state activity is required because "forc[ing] the group to accept members it does not desire . . . may impair the ability of the original members to express only those views that brought them together." *Roberts*, 468 U.S. at 623. However, Rotary eschews the expression of opinion as an organization. It seeks instead to offer a forum for the expression of views rather than to advance views of its own. The role of Rotary is not to advance particular viewpoints, but merely to "provide a forum for the presentation of public questions," assuring "that both sides be adequately represented" when controversial questions are aired at club-sponsored events. *Jt. App.* at 58. The Rotary Manual of Procedure commands that "no corporate action or corporate expression of opinion will be taken or given by R.I. [Rotary International] on political subjects." *Id.* at 59. Local clubs are instructed by Rotary International to "not adopt resolutions of any kind dealing with specific plans relating to international affairs." They "should not direct appeals for action from clubs in one country to clubs, peoples, or governments of another country or circulate speeches or proposed plans for the solution of specific international problems." *Id.* Because the Rotary organization does not attempt to advance any particular views, the judgment of the court below does not hamper "the organization's ability to express its views," *Roberts*, 468 U.S. at 624. Appellants have failed to demonstrate that the judgment of

the court below "imposes any serious burdens on the male members' freedom of expressive association." *Id.* at 626.

Furthermore, any minimal infringement on the right of Rotarians to associate for expressive purposes resulting from the judgment below may be justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623. The states have a compelling interest in "assuring its citizens equal access to publicly available goods and services." *Id.* at 624.

The Rotary organization is in significant respects a public organization, and it clearly makes available services, such as business contacts and commercial programs, to its members. It is public in its membership recruitment and the use of publicity in local media to attract and retain members. The services available to members include business contacts and business relations conferences where "[t]he Rotarian learns management techniques that help improve his own business or professional skills." *Jt. App.* at 14. In assuring equal access to such publicly available services, the state protects its female citizens from a denial of individual dignity and protects society from a denial of the "benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625.

Any abridgment of appellants' freedom of expressive association created by the judgment of the Court below "is no greater than is necessary to accomplish the State's legitimate purposes." *Id.* at 628. Private discrimination has never been accorded affirmative constitutional protection. In *Norwood v. Harrison*, 413 U.S. 455 (1973), this Court held that a state may not loan textbooks to a segregated school:

[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on



the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

*Id.* at 469-70.

## CONCLUSION

Appellants have failed to demonstrate that the judgment of the court below imposes any serious burdens on its male members' freedom of intimate or expressive association. Therefore, the judgment of the court below should be affirmed.

Dated: January 28, 1987.

Respectfully submitted,

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Supreme Court, U.S.  
**FILED**

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No. 86-421

**In The  
Supreme Court of the United States  
October Term, 1986**

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**BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,**  
*Appellants,*  
v.

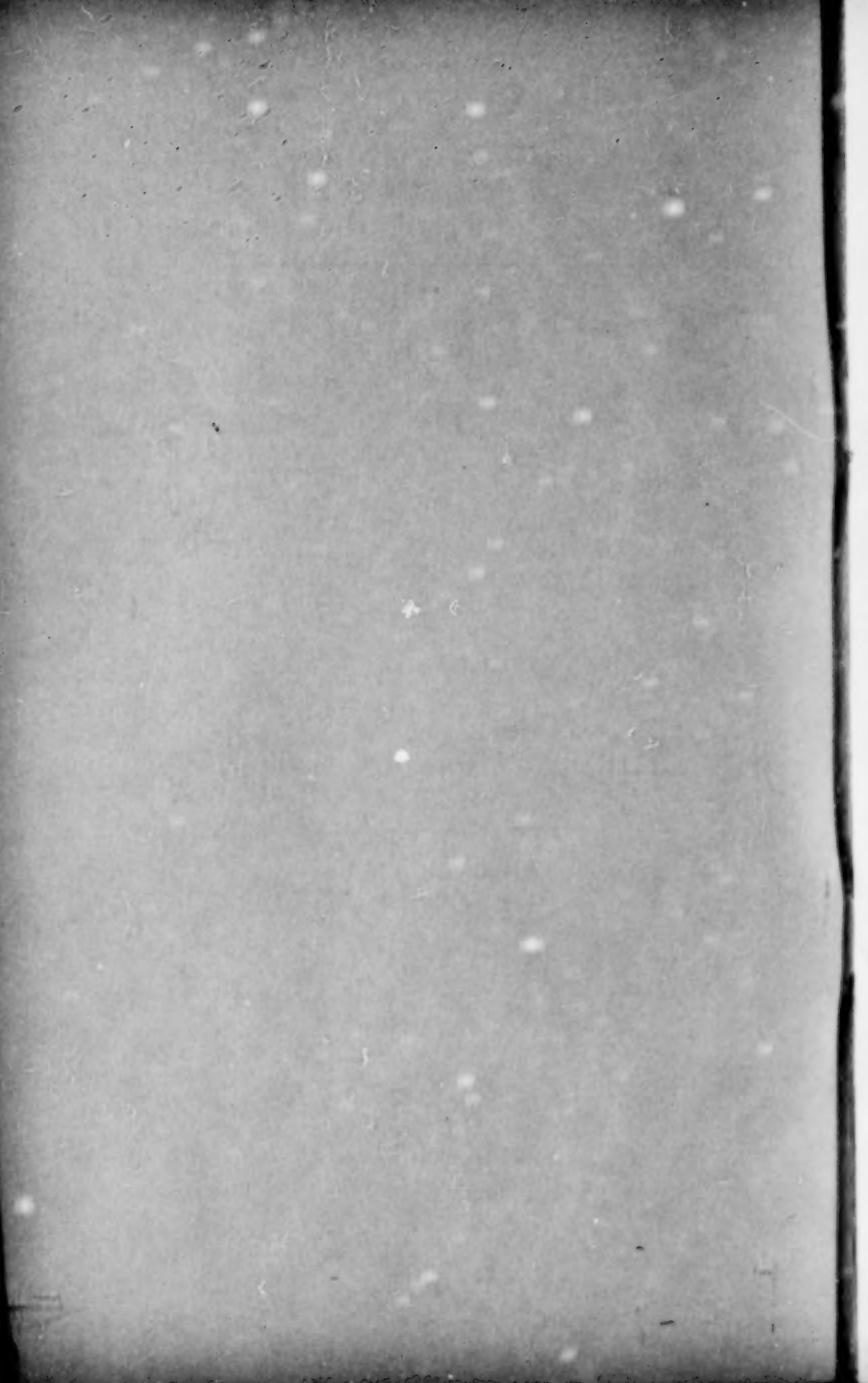
**ROTARY CLUB OF DUARTE, et al.,**  
*Appellees.*

— o —  
**Appeal from the Court of Appeal  
of the State of California  
Second Appellate District**

— o —  
**BRIEF OF INTERVENOR  
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## QUESTIONS PRESENTED

1. Does Rotary International timely raise any substantial constitutional questions which were not answered by this Court's decision in *Roberts v. United States Jaycees*?

2. Is any constitutionally protected right of association violated when the Unruh Civil Rights Act, California Civil Code section 51, is construed as prohibiting Rotary International from expelling or otherwise penalizing Rotary Club of Duarte because the latter chooses to admit women as members?

3. Is the Unruh Civil Rights Act, as construed, unconstitutionally vague or overbroad?

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No. 86-421

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In The  
**Supreme Court of the United States**  
October Term, 1986

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BOARD OF DIRECTORS OF ROTARY  
INTERNATIONAL, et al.,  
*Appellants,*  
v.

ROTARY CLUB OF DUARTE, et al.,  
*Appellees.*

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**Appeal from the Court of Appeal  
of the State of California  
Second Appellate District**

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**BRIEF OF INTERVENOR  
STATE OF CALIFORNIA**

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**OPINIONS BELOW**

Intervenor State of California agrees with appellants' statement as to the opinions below.

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**JURISDICTION**

Appellants Board of Directors of Rotary International, et al., (Rotary International) invoke the jurisdiction of this Court pursuant to 28 United States Code sections 1257(2) and 2101(c). Appellees Rotary Club of Duarte,

et al., (Duarte) moved to dismiss or affirm on the grounds that the appeal timely presents no substantial federal question, and the State of California filed a brief as *amicus curiae* in support of Duarte's motion. This Court's order of November 3, 1986, postponed consideration of the jurisdictional question until the case is heard on the merits.

This appeal seeks to raise two federal questions: first, whether the California decision violates Rotary International's freedom of association, and, second, whether the Unruh Civil Rights Act, California Civil Code section 51, (Unruh) is unconstitutionally vague and overbroad. Neither question merits the full attention of this Court. The California Court of Appeal considered appellants' freedom of association claims and construed and applied Unruh in a manner fully consistent with this Court's recent opinion in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), which establishes the guidelines for constitutionally protected freedom of association. Furthermore, the second issue as to the purported vagueness and overbreadth of Unruh was not timely presented below. In any event, the second issue is also not substantial. Unruh, as construed by California courts, offends no constitutional guarantees; no basis exists to declare the state statute unconstitutional.

### **Appellants' Federal Claims Are Not Substantial**

A substantial federal question must, of course, exist in order for this Court to devote its full attention to reviewing the decision below either by appeal or on writ of certiorari. As this Court explained in *Zucht v. King*, 260 U.S. 174, 176 (1922):

"[I]t is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character."

See also *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902); U.S. Sup. Ct. R. 15.1(h), 16.1(b) and (c), and 17.1(c). The Court grants motions to dismiss appeals from state courts where "[i]n the light of our previous decisions, appellants have failed to raise any substantial federal questions. . . ." (*Palmer Oil Corp. v. Amerada Corp.*, 343 U.S. 390, 391 (1952).)

As discussed more fully below, *Jaycees* disposes of appellants' constitutional claims. While freedom of association protects "intimate human relationships," *Jaycees*, 468 U.S. at 617, Rotary International, representing over 900,000 members, like the 295,000 member United States Jaycees, is clearly "outside of the category of relationships worthy of this kind of constitutional protection." (*Id.*, at 620.) Freedom of expressive association is likewise not implicated because, as in *Jaycees*, there is "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." (*Id.*, at 627.)

Appellants' contention that Unruh is unconstitutionally vague and overbroad is similarly answered by the Court's reasoning in *Jaycees*. California courts, like Minnesota courts, have construed state law so as to avoid any constitutional problems. As explained in *Jaycees*, the "construction of the Act . . . ensures that the reach of the statute is readily ascertainable" (*id.*, at 630), and "does not create an unacceptable risk of application to a substantial amount of protected conduct" (*id.*, at 631.)

Since appellants' federal claims are identical to those addressed in *Jaycees*, and since the United States Jaycees



and Rotary International are virtually indistinguishable as to the pertinent qualities and characteristics identified as significant in *Jaycees*, no reason exists for this Court to devote its full attention to the merits of this appeal. The *Jaycees* decision, issued just two and a half years ago without any dissent, disposes of appellants' constitutional concerns.

### **Appellants' Vagueness and Overbreadth Claims Are Not Timely**

Throughout the proceedings which resulted in the decision under review herein, appellants' federal claims concerned freedom of association, and the court below ruled that "application of the Unruh Act to International does not abridge its freedom of intimate or expressive association." (App. to Juris. Statement C-38.) While appellants also argued that Unruh did not apply to Rotary International, an argument with which the trial court agreed (App. to Juris. Statement B-8 - B-9) but which the California Court of Appeal conclusively rejected (App. to Juris. Statement C-22 and C-28 - C-29), they did not directly challenge the statute itself as unconstitutionally vague or overbroad.<sup>1</sup> The Court of Appeal consequently did not address any such claim. Appellants' Petition for Rehearing to the Court of

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1. Appellants' Brief in Opposition to Motion to Dismiss, 3-4, refers to a section of their brief below which argued not that Unruh is unconstitutionally vague or overbroad, but that California courts have construed Unruh not to apply to organizations like Rotary International in order to protect freedom of association. At best, the issues of vagueness and overbreadth were merely suggested as possible reasons for a limited construction of Unruh which would exclude coverage of Rotary International.

Appeal argued directly, for the first time, that Unruh was an unconstitutional statute because of vagueness and overbreadth. (Pet. for Reh., 29-36.) However, generally California courts will not "consider points on rehearing not previously raised . . ." (*County of Imperial v. McDougal*, 19 Cal.3d 505, 513 (1977).)

Appellants' failure to assert in a timely manner that Unruh itself is unconstitutionally vague and overbroad precludes review of those issues by this Court. As explained in *Webb v. Webb*, 451 U.S. 493, 496-497 (1981):

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system."

See also U.S. Sup. Ct. R. 15.1(g), 16.1(b), and 21.1(h).

The Court of Appeal's failure to address these issues supports Duarte's claim that this Court lacks jurisdiction to decide these questions. As this Court stated in *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), in refusing to consider a federal preemption claim:

"[W]e conclude that we have no jurisdiction to consider this contention. The decision below does not discuss this issue, and when 'the highest state court has failed to pass upon a federal question, it will be presumed that the omission was due to want of proper presentation in the state courts, . . .'" [citations omitted]."

See also *Webb v. Webb*, 451 U.S. at 495.

If this Court finds that the instant case does raise substantial federal questions, and assuming, arguendo, it finds that freedom of association precludes Unruh's application

to Rotary International, it nevertheless should limit its review to the particular facts herein and refuse to consider appellants' wholesale attack on U.S.A.

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## CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional provisions and statutes specified by appellants, this case involves Article I, Section 8, of the California Constitution, which provides:

“A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.”

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## STATEMENT OF THE CASE

This case arose because the Rotarians who belong to the Rotary Club of Duarte decided to admit women as members of their local club. (App. to Juris. Statement F-4.) The membership restrictions of Rotary International do not permit women to be members of local clubs<sup>2</sup>, and proposals to eliminate the male-only constitutional provision have been rejected. (*Ibid.*) Rotary International, a worldwide association of nearly 20,000 local Rotary Clubs, representing over 900,000 local club members (App. to Juris.

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2. Article IV, Section 3(a), of the Constitution of Rotary International provides that “[a] Rotary Club shall be composed of men . . .” (J.A. 6 and 11.)

Statement F-2), expelled Duarte from the association (App. to Juris. Statement F-5.)

### **Procedural Posture**

The Rotary Club of Duarte and its female members sued the Board of Directors of Rotary International, alleging that Duarte's expulsion was in violation of Unruh and Article I, Section 8, of the California Constitution. (J.A. 1-9.) The Superior Court of California ruled in favor of Rotary International. (App. to Juris. Statement A and B.) This decision was reversed on appeal. (*Rotary Club of Duarte v. Board of Directors of Rotary International*, 178 Cal.App.3d 1035 (1986), reprinted as App. to Juris. Statement C.) The California Supreme Court denied review. (App. to Juris. Statement D.)

The California Court of Appeal determined that Unruh<sup>3</sup> prohibits Rotary International and Duarte from excluding from or terminating membership arbitrarily on the basis of sex. (App. to Juris. Statement C-29.) This decision as to state law and the state court's construction of Unruh are, of course, conclusive. (*Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, — U.S. — [106 S.Ct. 2968, 2976] (1986); *Austin v. Boston*, 74 U.S. 694, 698 (1868).)

The California Court of Appeal also determined that constitutional protection for freedom of association did not prevent California from prohibiting the enforcement of

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3. The Unruh Civil Rights Act, California Civil Code section 51, provides, in pertinent part, that "[a]ll persons . . . no matter what their sex . . . are entitled to the full and equal . . . advantages, . . . privileges, or services in all business establishments of every kind whatsoever."

Rotary International's discriminatory membership policies against Rotary Club of Duarte. (App. to Juris. Statement C-36, C-38.)

An appeal to this Court was filed, and a motion to dismiss or affirm. On November 3, 1986, the Court postponed consideration of the jurisdictional question until the case is heard on the merits. On December 15, 1986, this Court granted California leave to intervene as a party.

### **Material Facts**

Rotary International's male-only tradition reflects an anachronistic vision of business and professional activities, at least in California. As described by Herbert A. Pigman, the General Secretary of Rotary International:

"There is a historical basis for the male only provision. It was founded in 1905 on the basis that this would be an organization of service comprising business and professional leaders. In the society of America, in that era, there were very, very few women in positions of business and professional leadership at that time." (App. to Juris. Statement G-51.)

This situation has unmistakably changed in much of today's world, and has certainly changed in California, but Rotary International has refused to permit its membership policies to be modified correspondingly.<sup>4</sup> While Rotary International still describes itself as "a cross-section of [a community's] business and professional life" (Exh. C

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4. While women still are excluded as members, "ladies committees or other associations composed of women relatives of Rotarians" are permitted. (Exh. A-3 to Pigman Deposition, Excerpts from Rotary Manual of Procedure, 47, J.A. 44.) See also *id.*, 156, J.A. 68.

to Pigman Deposition, Excerpt from Rotary Extension Manual, J.A. 96), the "cross-section" is now greatly askew.

The original motivation for the formation of Rotary International was "to produce increased business for each member." (Exh. B to Pigman deposition, Excerpts from Rotary Basic Library, Vol. 1, *Focus on Rotary*, 1-2, J.A. 80.) For example, in 1915, a business promotion committee of the first local Rotary Club calculated that an estimated "\$1,750,000 worth of business was exchanged among the club's 265 members!" (*Id.*, Vol. 3, *Vocational Service*, 33-34, J.A. 93.)

This candid assessment of the business advantages for Rotarians is now cloaked by the mottoes of "Service Above Self" and "He Profits Most Who Serves Best." (Exh. A-3 to Pigman Deposition, Excerpts from Rotary Manual of Procedure, 157, J.A. 69.) The official purpose of Rotary International is to "provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." (*Id.*, 7, J.A. 35.)

It is undisputed that Rotarians do perform valuable community service, but it is also true that Rotarians continue to benefit in their business and professional lives due to their status as Rotarians. As described in a Rotary booklet, "Business Relations Conferences," (Exh. 9, J.A. 14):

"One of the most satisfying vocational service programs for the Rotarian is the business relations conference. The Rotarian learns management techniques that help improve his own business or professional skills."

Among the recommended vocational service projects for local clubs to undertake are career conferences, pro-



grams to provide business expertise to small businesses, and group discussions on topics such as employer-employee and buyer-seller relations. (Exh. 10, Rotary booklet, "What Can We Do in Vocational Service," J.A. 28-29.) Rotary International recommends that each local club establish committees to give "confidential business advice and assistance to Rotarians" and to discuss "problems which are primarily of an economic nature." (Exh. A-3, 38, J.A. 40.) International conferences also permit Rotarians to "share ideas and fellowship with other Rotarians from all over the world in the same related business and professional fields." (Exh. B, 38-39, J.A. 83.)

A former treasurer of a local Rotary Club estimated that 95 percent of members' dues were paid by their companies or businesses as legitimate business expenses. (Stip. regarding Testimony of Dr. Jacob Frankel, J.A. 34.) Dr. Frankel, president of California State College, Bakersfield, considered Rotary membership essential for his fund raising work, and encouraged his cabinet members, all of whom were male, to become Rotarians. (J.A. 34.) An additional example of the business benefits of membership is the official directory of hotels owned or operated by Rotarians "for the convenience of Rotarians who travel . . ." (Exh. A-3, 171, J.A. 75.)

Rotary International, itself, operates as a large-scale business. The General Secretary supervises a staff of approximately 300 persons in offices in six countries. (Exh. A-3, 14, J.A. 36.) It receives annual dues of \$17.00 for each of the approximately 900,000 Rotarians. (Exh. A-3, 104, J.A. 56.) It sells magazine subscriptions to members (*ibid.*, J.A. 57), and solicits paid advertising for its offi-



cial magazine (*id.*, 169-170, J.A. 74). Revenue is also received from conference fees, charter fees, license fees, royalty payments, and investments. (*Id.*, 104, J.A. 56; *id.*, 150, J.A. 67.)

Rotary International is an association of nearly 20,000 local clubs, not individual Rotarians, and the over 900,000 Rotarians are actually members of local clubs averaging 50 members each but ranging in size "from fewer than 20 to more than 900." (Pigman Deposition, App. to Juris. Statement G-15.) While a weekly meeting attendance rate of 60 percent is mandatory (*id.*, G-23), those in attendance at local club meetings are frequently not members of the local clubs. Rotarians commonly attend meetings of other nearby local clubs, as well as clubs around the world, and visitors from other Rotary clubs may number "in the tens and twenties each week." (*Id.*, G-23 - G-24.) Joint meetings may be held with other service clubs. (Exh. A-3, 36, J.A. 39, and *id.*, 44, J.A. 42.) Non-Rotarian guests at meetings may include "employees, competitors, customers, and salesmen." (Exh. 10, J.A. 25), and other "non-Rotarian members of the community." (Exh. A-3, 35, J.A. 39), especially prospective members (*id.*, 143, J.A. 66, and Exh. B, 44, J.A. 89.) Favored guests are "non-Rotarian businessmen" (Exh. 9, J.A. 14); students (Exh. A-3, 122, J.A. 60, and *id.*, 146, 67); members of the news media (*id.*, 166-168, J.A. 72); and representatives of labor and employer organizations (*id.*, 233, J.A. 78.)

As a final matter, while Rotarians are united in their interest in community service, this unity does not extend to the establishment of a single set of ideas or ideals to

which all Rotarians must adhere. As stated in the Rotary Basic Library:

“[T]hroughout the years there has been no attempt to create a single R.I. ‘corporate image.’ And this has been another source of Rotary’s strength, for it permits worldwide diversity within an overall unity, minimizing the potential for conflict and maximizing the thrust toward harmony among clubs and Rotarians of different nations and cultures.” (Exh. B, J.A. 82.)

Rotarians are tolerant and respectful of other cultures and religions (*id.*, J.A. 85), and in the interest of advancing fellowship and good-will, local clubs are advised, when discussing controversial public questions, to ensure “that both sides be adequately represented.” (Exh. A-3, 115. J.A. 58.)

As Rotary International describes itself:

“Every Rotary Club must have its windows and doors open to the whole world. Rotary membership offers rich opportunities for growth in international understanding and goodwill to the ordinary business and professional man in any community, large or small, in almost 160 countries. In fact, there are many men who have Rotary to thank for opportunities which otherwise never would have come their way. . . .” (Exh. B, J.A. 85.)

California’s interest in this case is to ensure that women, as well as men, may share in these opportunities, so that women will not be denied business advantages or participation in enterprises affected with a public interest because of their sex, in violation of Unruh, and so that women will not be disqualified from pursuing business be-

cause of their sex, in violation of Article 1, Section 8, of the California Constitution.

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### SUMMARY OF ARGUMENT

The California Court of Appeal properly considered and rejected appellants' constitutional objections to the application of Unruh to Rotary International's discriminatory membership practices. California has a long tradition of prohibiting sex discrimination by all enterprises "affected with a public interest." (*In re Cox*, 3 Cal.3d 205, 212 (1970).) Common law doctrine has now been codified in Unruh. In addition, Article 1, section 8, of the California Constitution expressly provides that sex discrimination shall not be permitted to prevent persons from pursuing businesses or professions. California's concern for guaranteeing all persons, regardless of their gender, equal opportunity in business activities is long-standing and compelling.

The facts of the instant case show that Rotary International may not justify its discriminatory practices by professing constitutional immunity from state regulation. *Jaycees* disposes of any claim that constitutional protection for freedom of association exempts Rotary International from Unruh.

Freedom of association rights may be implicated if the government seeks to interfere either with "intimate human relationships" (*Jaycees*, 468 U.S. at 617), or with "collective effort on behalf of shared goals" (*id.*, at 622). Neither

aspect of constitutionally protected associational rights is endangered by the decision below. Regarding the right of intimate association, Rotary International, like United States Jaycees, is clearly "outside of the category of relationships worthy of this kind of constitutional protection" (*id.*, at 620). If 295,000 Jaycees are "not 'private' in any meaningful sense of that term" (*id.*, at 631, O'Connor, J., concurring), then neither are 900,000 Rotarians.

Freedom of expressive association is also not implicated since the presence of female members would in no way interfere with "the ability of the original members to express only those views that brought them together." (*Jaycees*, at 623.) Rotarian public service activities are not related in any way whatsoever to any male-only membership requirement, and neither the purpose nor the expression of the preferred views of Rotary International will be impeded by female members.

Rotary International's claim that Unruh is unconstitutionally vague and overbroad is also disposed of in *Jaycees*, to the extent this claim raises any legitimate concerns. This Court recognized that "the Minnesota court's construction of the Act by use of . . . familiar standards ensures that the reach of the statute is readily ascertainable" (*id.*, at 630), and that "the Act, as currently construed, does not create an unacceptable risk of application to a substantial amount of protected conduct" (*id.*, at 631). California courts, like those of Minnesota, have ensured that the statute satisfies all constitutional requirements.

In sum, this case, like *Jaycees*, exemplifies the authority of a state to enact an equal access law which "protects the State's citizenry from a number of serious social and

personal harms.” (*Jaycees*, 468 U.S. at 625.) While California’s legislation imposes non-discrimination requirements which exceed those of federal law, the State’s commitment to equal opportunity is constitutionally sound. The decision below should therefore be affirmed.

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## ARGUMENT

### **I. CALIFORNIA IS STRONGLY COMMITTED TO THE GUARANTEE OF EQUAL ACCESS TO BUSINESS OPPORTUNITIES AND PUBLIC INTEREST ENTERPRISES.**

California’s Unruh Civil Rights Act evidences this State’s firm belief that discrimination in access to economic advantages and opportunities and to enterprises affected with a public interest offends public policy. (*Koire v. Metro Car Wash*, 40 Cal.3d 24, 36 (1985); *Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721, 738 (1982), cert. denied 459 U.S. 858; and *In re Cox*, 3 Cal.3d 205, 212 and 215 (1970).) The State’s commitment to eradicating gender discrimination is particularly strong, “[c]onsidering this state’s special constitutional sensitivity to sexual discrimination [citations omitted].” (*Isbister v. Boys’ Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 85-86 (1985).) “Public policy in California strongly supports eradication of discrimination based on sex.” (*Koire*, 40 Cal.3d at 36.)

California led the nation in recognizing that “[w]omen, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities.” (*Sail’er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 19 (1971).) Former Article XX,

section 18, of the California Constitution, adopted May 7, 1879, provided:

“No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession.”

The California Supreme Court was quick to describe this section as “considerations of policy, the determination of which belonged to the convention framing and the people adopting the Constitution; . . . ” (*Matter of Maguire*, 57 Cal.604, 608 (1881).) See also *Sail’er Inn, Inc. v. Kirby*, 5 Cal3d at 8. The “explicit and unqualified language” (*ibid.*), now found in Article 1, Section 8, of the California Constitution, establishes the constitutional right to freedom from sex discrimination in pursuing business opportunities.

Both common law and statutory law supplement this constitutional guarantee and reinforce California’s firm commitment to the elimination of discriminatory practices by enterprises affected with a public interest. Unruh, the state statute at issue in the instant case, was enacted substantially in its present form in 1959 (Cal. Stats. 1959, ch. 1866, § 1, p. 4424)<sup>5</sup>, but as the California Supreme Court has often explained, Unruh and its predecessor statutes are legislative codifications of a common law doctrine forbidding all arbitrary discrimination by enterprises affected with a public interest. (*Marina Point*, 30 Cal3d at 738.) See also *Isbister*, 40 Cal3d at 78-79); *Gay Law Students*

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5. The express prohibition of discrimination on the basis of sex was added to Unruh in 1974. (Cal. Stats. 1974, ch. 1193, § 1, p. 2568.)



*Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458, 489-490 (1979); and *In re Cox*, 3 Cal.3d at 212.

Furthermore, California's common law doctrine prohibiting arbitrary discrimination and its civil rights statute have always extended to discrimination by private organizations. (*James v. Marinship Corp.*, 25 Cal.2d 721, 740 (1944).) As explained in one of the earliest reviews of Unruh:

"The Legislature in the exercise of the police power may in appropriate circumstances prohibit private persons or organizations from violating this policy." (*Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 471 (1962).)

As this Court recognized in *Jaycees*, federal anti-discrimination statutes were generally not available to address private discrimination until recent years, and the regulation of discriminatory practices by private groups or individuals was left primarily to the states.

"[State] laws provided the primary means for protecting the civil rights of historically disadvantaged groups until the Federal Government reentered the field in 1957." (*Jaycees*, 468 U.S. at 624.)

Unruh, and its predecessor statutes and common law doctrine, are clearly included among such state laws. As was stated in 1920, when segregated seats in theaters were held to violate former California Civil Code section 51, and the California statute was compared to civil rights laws in other states:

"There is no doubt as to where the weight of authority lies on this point. It upholds such statutes, and also holds that conduct such as that of the de-



endants toward plaintiff constitutes a discrimination against the negro on account of his color and race in violation of his rights under such Civil Rights Bills." (*Jones v. Kehrlein*, 49 Cal.App. 646, 650-651 (1920).)

California is thus firmly committed to protecting civil rights and prohibiting private discrimination which adversely affects society as well as the individual victims of discrimination. The decision below carries forth that compelling public interest.

## II. CONSTITUTIONAL PROTECTION FOR FREEDOM OF ASSOCIATION DOES NOT EXCUSE ROTARY INTERNATIONAL'S DISCRIMINATION.

As this Court has reaffirmed on numerous occasions:

"Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." (*Norwood v. Harrison*, 413 U.S. 455, 470 (1973).)

See also *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976); and *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93-94 (1945). Private discrimination, standing alone, is neither valued nor proscribed by the federal constitution. (*Norwood v. Harrison*, 413 U.S. at 469-470.)

Other constitutional protections may, however, be implicated if a state seeks to prohibit private discrimination. As this Court explained in rejecting constitutional challenges to Minnesota's regulation of the discriminatory membership of the United States Jaycees, constitutionally protected associational rights include both freedom of in-

timate association and freedom of expressive association. (*Jaycees*, 468 U.S. at 617-618.) Neither aspect of constitutionally protected freedom of association is jeopardized in the instant case.

**A. Freedom Of Intimate Association Does Not Protect An Organization With A Large And Shifting Membership Which Unites For Purposes Of Public Service And/Or Business Advantage.**

Freedom of intimate association is constitutionally protected "as a fundamental element of personal liberty." (*Jaycees*, 468 U.S. at 618.) Using descriptive terms such as "most intimate" and "highly personal," this Court explained that personal affiliations which are undoubtedly entitled to constitutional protection are those related to family, marriage, children, and cohabitation. (*Jaycees*, 468 U.S. at 619-620.) The Court further explained that the protection to be accorded any particular association "unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." (*Id.*, at 620.) The relevant factors to consider include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." (*Ibid.*)

Applying these factors in the instant case, and comparing Rotarians to Jaycees, leads to the conclusion that Rotary International, like United States Jaycees, lacks the requisite degree of intimacy necessary to claim constitutional immunity from state regulation pursuant to personal liberty. Size alone appears determinative, since

Rotary International is three times the size of United States Jaycees. Furthermore, while local clubs vary greatly in size, local affiliation does not represent any exclusivity in relationships, since members of other local clubs and even non-Rotarians frequently participate in local club activities. Membership is selective, but the selectivity is primarily along business and professional classifications, not personal affiliations. And, as a final consideration, whether the purpose of Rotary membership is for public service or business advantage, neither of these purposes require sanctuary from state regulation of discriminatory membership policies. Legitimate privacy interests are simply not at issue.

**B. Freedom Of Expressive Association Does Not Protect An Organization's Exclusionary Practices Where The Basis For Exclusion Is Unrelated To The Group's Shared Goals.**

Freedom of expressive association is constitutionally protected "as implicit in the right to engage in activities protected by the First Amendment . . . ." (*Jaycees*, 468 U.S. at 622.) Absent any compelling state interest, a state may not "impair the ability of the original members to express only those views that brought them together." (*Id.*, at 623.)

In the instant case, if Rotarians join merely to participate in community service, a requirement that women not be excluded as members has absolutely no effect on the ability of Rotarians to accomplish their shared goal of community service or to express any shared views. And if the goal is viewed as developing a network among community leaders, then California's compelling interest in

eliminating the societal, political, and economic harm caused by sex discrimination vastly outweighs any infringement of First Amendment rights.

As in *Jaycees*, there is simply no showing that female members "will change the content or impact of the organization's speech." (*Jaycees*, 468 U.S. at 628.)<sup>6</sup> To the contrary, since Rotary International has already established procedures to ensure that diverse viewpoints and cultures among members are respected and tolerated, not discouraged, there can be no legitimate claim that the mere presence of women members, or any varied viewpoints such women may either espouse or engender, would alter the group's philosophy.

Furthermore, just as the Minnesota statute at issue in *Jaycees* "imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members" (*id.*, at 627), membership organizations in California are not compelled by Unruh to admit persons whose interests are not consistent with those of the group. As explained in *James v. Marinship Corp.*, 25 Cal.2d 721 (1944), where a union not permitted to exclude black members argued that California law would destroy the union by forcing it to admit all persons to membership, including those with inimical interests:

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6. Given California's compelling interest in eradicating sex discrimination, those seeking to defend discriminatory practices as necessary to protect freedom of expressive association must demonstrate "the Act imposes any serious burdens on the male members' freedom of expressive association." (*Jaycees*, 468 U.S. at 626.) See also *Hishon*, 467 U.S. at 78.

"The right of the union to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union [citations omitted] affords it an effective remedy against such persons." (*Id.*, at 736.)

Rotary International may similarly require that all Rotarians, male and female, share in the group's community service philosophy and activities.

Even assuming, arguendo, that eliminating the categorical exclusion of women may infringe, to some degree, upon the Rotarians' protected freedom of expression, "that effect is no greater than is necessary to accomplish the State's legitimate purposes." (*Jaycees*, 468 U.S. at 628.) Since the purpose of Unruh is not to suppress free speech, but to further California's compelling interest in eliminating arbitrary discrimination, the application of Unruh in the instant case does not violate the freedom of expressive association described in the majority opinion in *Jaycees*.

In her concurring opinion in *Jaycees*, Justice O'Connor proffered an alternative standard for ensuring protection of First Amendment concerns, drawing a distinction between commercial and expressive activity. According to her proposed test:

"An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy . . . ." (*Jaycees*, 468 U.S. at 636.) (O'Connor, J., concurring.)

Applying this standard in the instant case also leads to the conclusion that First Amendment rights are not

jeopardized by requiring the admission of women as members. Rotary International, with its staff of 300, its annual revenue of over \$15,000,000 from membership and additional revenue from other sources, and its emphasis on developing business and professional skills among its members, is certainly in the commercial marketplace to a substantial degree.

Whichever standard is used for measuring First Amendment concerns, Rotary International's activities and philosophy either fall outside the area of protection, or are only minimally affected as compared with the state's overriding interest in promoting equal opportunity in all enterprises affected with a public interest.

### **III. UNRUH, AS CONSTRUED BY CALIFORNIA COURTS, IS NEITHER UNCONSTITUTIONALLY VAGUE NOR OVERBROAD.**

Appellants contend that Unruh is unconstitutionally vague and overbroad,<sup>7</sup> but a review of California court decisions demonstrates that Unruh has been carefully construed so as to avoid constitutional infirmities. Since court decisions provide definition and limitation to Unruh, no basis exists to declare the state statute unconstitutional.

The doctrines of overbreadth and void-for-vagueness are both concerned with the chilling effect a statute may have upon lawful conduct. Overbreadth analysis involves claims that a "statute's very existence may cause others

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7. Appellees, joined by the State of California, of course assert that this Court lacks jurisdiction to review this contention. See jurisdictional discussion above, pages 1-6.



not before the court to refrain from constitutionally protected speech or expression.” (*Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).) Vagueness claims allege that a statute fails to give adequate notice of prohibited conduct. (*Id.*, at 607.) Neither doctrine justifies the invalidation of a state statute where, as here, the conduct in question is clearly prohibited by the statute, and state court decisions have adopted “limiting constructions” and “commonly used and sufficiently precise standards.” (*Jaycees*, 468 U.S. at 631.)

**A. California Court Decisions Give Definite Content to Unruh’s Prohibition of Arbitrary Discrimination By All Business Enterprises.**

Appellants contend that Unruh is unconstitutionally vague in two respects.<sup>8</sup> First, appellants argue that the ban on arbitrary discrimination is not an intelligible standard. (Appellant’s Brief, 40-41.) Appellants also claim that the phrase “all business establishments of every kind whatsoever” is not sufficiently certain. (*Id.*, at 43-45.) Appellants are wrong on both claims.

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8. Appellants also confuse a “void-for-vagueness” argument with a so-called “choice of law” question. (Appellants’ Brief, p. 45.) This issue is scarcely worthy of discussion. A state may unquestionably use its police power to regulate conduct in the state which offends the public policy of that state, whether or not such conduct is lawful in other states. (*Travelers Health Assn. v. Virginia*, 339 U.S. 643, 650 (1950); *Pacific Ins. Co. v. Comm’n.*, 306 U.S. 493, 503 (1939).)



# **1. Appellants May Not Challenge Unruh's Prohibition Of All Arbitrary Discrimination.**

Appellants argue at some length that California court decisions interpreting Unruh as prohibiting all arbitrary discrimination render the state statute unconstitutionally vague because the term "arbitrary" is not an intelligible standard. Unruh, on its face, expressly prohibits discrimination on six enumerated bases, including sex, but this list of expressly prohibited bases of discrimination has been interpreted as "illustrative rather than restrictive." (*In re Cox*, 3 Cal.3d at 216.) See also *Marina Point*, 30 Cal.3d at 734, where the California Supreme Court explained:

"As we pointed out in *Cox*, . . . from before the beginning of the twentieth century California's public accommodation statutes have uniformly proscribed the exclusion of individuals on the basis of purely arbitrary classifications."

Of course, sex discrimination is expressly prohibited in Unruh. See Cal. Stats. 1974, ch. 1193, § 1, p. 2568. Furthermore, sex discrimination is the only basis of discrimination at issue in the instant case. No question has been raised as to Rotary International's membership selection criteria except for the exclusion of all women, and no question has been raised as to whether selection criteria used by other organizations are arbitrary or justified.

Assuming, arguendo, that birdwatcher clubs or trial lawyer organizations may wonder whether they may, consistent with Unruh, limit their membership to persons who have spotted 100 birds or appeared in 100 trials, such speculation as to possible future Unruh applications does not

justify a void-for-vagueness attack on Unruh's prohibition of all arbitrary discrimination. Unruh expressly forbids sex discrimination, which is the conduct at issue herein. As explained in *Parker v. Levy*, 417 U.S. 733, 756 (1974):

"One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."

As further amplified in *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 (1982):

"A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

Since Unruh expressly forbids sex discrimination, and since sex discrimination is the only issue herein, this Court should not entertain appellants' argument that the term "arbitrary" is uncertain and does not give sufficient notice as to prohibited conduct.

## **2. California Courts, Like Federal Courts, Have Well-Defined Standards To Identify Arbitrary Discrimination.**

As discussed above, Unruh codifies California's longstanding "common law doctrine that certain public enterprises are obliged to serve all without arbitrary discrimination." (*Isbister*, 40 Cal.3d at 78.) Because Unruh forbids not merely the enumerated bases of discrimination, but also all arbitrary discrimination, Rotary International claims the reach of Unruh is uncertain. This claim ignores the well-articulated standards developed in numerous California court decisions. Indeed, California's description of arbitrary discrimination is analogous to and consistent

with this Court's standard for identifying arbitrary discrimination which violates equal protection guarantees.<sup>9</sup>

The focus of Unruh, like equal protection, is that individuals must not be evaluated based upon generalized or stereotypical ideas as to group characteristics which may, in fact, not be true as to the particular individual. As the California Supreme Court has explained:

"Though one may be excluded from a 'business establishment' on an individual basis 'if he conducts himself improperly or disrupts the operations of the enterprise,' it is 'arbitrary,' and therefore prohibited, to exclude *an entire class* on the basis of stereotyped notions." (*Isbister*, 40 Cal.3d at 87, citing *Marina Point*, 30 Cal.3d at 738-739, and *In re Cox*, 3 Cal.3d at 217-218.) (Emphasis by Court.)

The same rejection of class-wide exclusions and stereotypes permeates equal protection analysis. For example, as this Court warned in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-725 (1982):

"[Gender-based classifications] must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."

Indeed, descriptions of the equal protection guarantee, with its mandate of equal treatment of similarly-situated individuals and its rejection of group stereotypes are

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9. Equal protection violations, unlike Unruh violations, require state action, but for purposes of analyzing appellants' claim that "arbitrary" is an unintelligible term, this distinction is irrelevant.

equally descriptive of Unruh's guarantee. According to one eminent constitutional scholar:

"The substantive core of the [fourteenth] amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by organized society as a respected, responsible, and participating member." (Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv.L.Rev. 1, 4 (1977).)

"In its most typical application, the principle of equal citizenship will operate to prohibit the society from inflicting a 'status-harm' on members of a group because of their group membership." (*Id.*, at 8.)

See also Rotunda, Nowak, Young, *Treatise on Constitutional Law*, Vol. 2, 317 (1986). (Equal protection guarantees that "classifications will not be based on impermissible criteria or arbitrarily used to burden a group of individuals.")

California courts have similarly described Unruh as requiring that individuals not be classified based upon group stereotypes. As explained in *Marina Point*, 30 Cal.3d at 740:

"[T]he exclusion of individuals from places of public accommodation or other business enterprises covered by the Unruh Act on the basis of class or group affiliation basically conflicts with the individual nature of the right afforded by the act of access to such enterprises. As the United States Supreme Court observed in reaching a similar conclusion with respect to the antidiscrimination provisions of title VII of the federal Civil Rights Act of 1964 . . . 'Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.' (Italics added.)

“As *Cox* makes clear, of course, under the Unruh Act exclusion on the basis of a group classification is as improper when applied to ‘children’ or ‘families with children’ as it is when applied to occupational, racial, religious or other broad ‘status’ classifications.”

See also *Curran v. Mount Diablo Council of the Boy Scouts*, 147 Cal.App.3d 712, 733 (1983). (“[T]he statute’s focus on the individual precludes the exclusion of persons based on a generalization about the class to which they belong.”)

Further support for the fact that the term “arbitrary” is a term with “a reasonable degree of clarity” (*Jaycees*, 468 U.S. at 629) is the fact that this Court has itself used the term on numerous occasions in decisions evaluating those equal protection claims which are not presumptively invidious. See *Bowen v. Owens*, — U.S. — [106 S.Ct. 1881, 1985] (1986); *City of Cleburne v. Cleburne Living Center*, — U.S. — [105 S.Ct. 3249, 3258] (1985); *Hodel v. Indiana*, 452 U.S. 314, 332 (1981); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 53 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); and *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Indeed, one of the most frequently quoted descriptions of the equal protection guarantee begins with the admonition that “the classification must be reasonable, not arbitrary, . . .” (*Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).)

Given this close similarity between Unruh and equal protection in their prohibition of arbitrary classifications and rejection of group stereotypes, it is not surprising that many of the same classifications determined to be arbitrary under Unruh have also been found to violate equal protec-

tion where the classification is unrelated to any legitimate or reasonable concern. Arbitrary sex classifications are, of course, unconstitutional, as well as unlawful under Unruh. See *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), and cases cited therein.

Arbitrary classifications based upon a person's sexual orientation or homosexual status are prohibited under Unruh. (*Curran*, 147 Cal.App.3d at 734; *Rolon v. Kulwitzky*, 153 Cal.App. 3d 289, 292 (1984); and *Stoumen v. Reilly*, 37 Cal.2d 713, 716 (1951). Such classifications also may violate equal protection if unrelated to any legitimate purpose. *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458, 475 (1979); *Scott v. Macy*, 349 F.2d 182, 184 (D.C. Cir. 1965); *Gay Students Org. of U. of New Hampshire v. Bonner*, 367 F.Supp. 1088, 1101 (D.N.H. 1974), aff'd on other grds. 509 F.2d 652 (1st Cir. 1974); and *Rowland v. Mad River Local School District*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting.)

Similarly, discrimination on the basis of age may violate Unruh (*Marina Point*, 30 Cal.3d at 740), and is also subject to the arbitrary standard of review under equal protection. (*Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); and *Vance v. Bradley*, 440 U.S. 93, 97 (1979).)

As a final example, grooming standards are also subject to the arbitrary standard of review under both Unruh (*In re Cox*, 3 Cal.3d at 217-218) and equal protection (*Hander v. San Jacinto Junior College*, 519 F.2d 273, 276 (5th Cir. 1975); and *Lansdale v. Tyler Junior College*, 470 F.2d 659, 664 (5th Cir. 1972).)



As these cases demonstrate, Unruh, like the equal protection clause, prohibits arbitrary classifications unrelated to legitimate purposes. Group status unrelated to the purpose of the classification may not be used to exclude entire groups of persons.<sup>10</sup>

Unruh's prohibition of arbitrary classifications does not, of course, mean that all classifications are unlawful. Again, consistent with equal protection analysis, Unruh only requires that the criteria used to distinguish one individual from another be reasonably related to the purpose of the selection and not based on bias or prejudice. Reasonable classifications recently upheld under Unruh include limiting access to funerals to those invited (*Ross v. Forest Lawn Memorial Park*, 153 Cal.App.3d 988, 993 (1984)), and excluding compulsive gamblers from gambling clubs (*Wynn v. Monterey Club*, 111 Cal.App.3d 789, 797 (1980) ("The overriding issue is always whether the denial of access to public accommodation is based on race, sex, religion or other arbitrary and unjustified basis.")).

The prohibition of arbitrary discrimination therefore does not mean, as appellants suggest, that all selectivity is unlawful, but only that group stereotypes may not be used as a shortcut for legitimate individual assessments. Where distinctions among individuals are justified by legitimate factors related to those individuals, classifications or exclusions based on those distinctions are perfectly lawful

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10. Appellants' argument that Unruh's failure to cover physical handicap discrimination is evidence of the uncertainty of "arbitrariness" ignores the fact that California deals with such arbitrary discrimination under a separate statute. See California Civil Code section 54.1, and *Marsh v. Edwards Theatres Circuit, Inc.*, 64 Cal.App.3d 881, 890 (1976).



under Unruh. Nothing in Unruh requires an association of community and business leaders, formed to create a network among such leaders, to open its doors to persons who do not satisfy reasonable membership criteria. Again, the parallel to equal protection is sound. As explained in *Karst*, 91 Harv.L.Rev. at 11, "The principle of equal citizenship is not a charter for sweeping economic [or social] leveling."

Just as courts have been able to distinguish legitimate classifications from arbitrary classifications under equal protection guarantees, California courts have outlined the nature of classifications which comply with Unruh. These decisions satisfy any concern that Unruh's prohibition of arbitrary discrimination is unconstitutionally vague.

### **3. California Courts Have Established Criteria To Identify Enterprises Covered by Unruh.**

California courts have construed the phrase "all business establishments of every kind whatsoever" so that those enterprises subject to Unruh may readily be identified, even though the phrase is "unique among the states" which have comparable civil rights laws. (Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute—A Problem in Statutory Application*, 33 So. Cal. L.Rev. 260, 262 (1960).)

As discussed above, Unruh now codifies California's common law doctrine that enterprises affected with a public interest may not discriminate arbitrarily. (*In re Cox*, 3 Cal.3d at 212.) Prior to the enactment of Unruh in 1959, California's codification of this common law doctrine used the more typical term "places of public accommodation,"<sup>11</sup>

<sup>11</sup> 11. Cal.Stats. 1897, ch. 108, § 1, p. 137; Cal.Stats. 1919, ch. 210, § 1, p. 309; and Cal.Stats. 1923, ch. 235, § 1, p. 485.

but a series of erratic court decisions<sup>12</sup> resulted in "fortuitous and inconsistent applications of the statute." (Horowitz, *The 1959 . . . Statute*, 33 So. Cal.L.Rev. at 276.) The phrase used in Unruh was a legislative response to these inconsistent cases. As explained by the California Supreme Court:

"[T]he Unruh Act was adopted out of concern that the courts were construing the 1897 public accommodations statute too strictly." (*Isbister v. Boys' Clubs*, 40 Cal.3d at 78.)

See also *In re Cox*, 3 Cal.3d at 214.

In construing the coverage of Unruh, courts have therefore recognized that Unruh was intended to continue the existing coverage of all places of public accommodation and places affected with a public interest as well as to broaden or extend the reach of the former statute to every business-like enterprise. See *Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 471 (1962); *O'Connor v. Village Green Owners Assn.*, 33 Cal.3d 790, 793-794 (1983); *Marina Point*, 30 Cal.3d at 731; *Swann v. Burkett*, 209 Cal.App.2d 685, 690 (1962); and 34 Ops. Cal. Atty. Gen. 230, 231-232 (1959).

Consequently, relying upon statutory history, California courts have held that at least all : places of public

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12. Compare *Long v. Mountain View Cemetery Assn.*, 130 Cal.App.2d 328 (1955) (cemetery not covered), *Coleman v. Middlestaff*, 147 Cal.App.2d Supp. 833 (1957) (dentist's office not covered), and *Reed v. Hollywood Professional School*, 169 Cal.App.2d Supp. 887 (1959) (school not covered), with *James v. Marinship Corp.*, 25 Cal.2d 721 (1944) (union covered), *Evans v. Fong Poy*, 42 Cal.App.2d 320 (1941) (saloon covered), *Suttles v. Hollywood Turf Club*, 45 Cal.App.2d 283 (1941) (racetrack covered), and *Lambert v. Mandel's of California*, 156 Cal.App.2d Supp. 855 (1957) (shoe store covered).

accommodation previously covered by former Civil Code section 51 are still covered by Unruh. For example, in *Isbister*, the Boys' Clubs was held to be subject to Unruh because "the Boys' Club of Santa Cruz is a 'place of public accommodation or amusement,' and thus a 'business establishment' covered by the Act." (*Isbister*, 40 Cal.3d at 81.) See also *Curran v. Mount Diablo Council of the Boy Scouts*, 147 Cal.App.3d 712, 732 (1985).

Statutory history has also been relied upon by the courts to reject the contention that Unruh only covers businesses organized for profit. The fact that language exempting coverage of nonprofit groups was eliminated from Unruh but included in other civil rights legislation enacted during the same legislative session has been held to be evidence that such nonprofit groups are to be included under Unruh. See *Isbister*, 40 Cal.3d at 84-85; *Curran*, 147 Cal. App.3d at 732. The Legislature's elimination of other restrictive language or specific references to particular businesses has also been viewed as an intent to ensure broad coverage. (*O'Connor*, 33 Cal.3d at 795; *Pines v. Tomson*, 160 Cal.App.3d 370, 385 (1984).)

California courts have also turned to ordinary dictionary definitions to construe the coverage of Unruh. As stated in an early decision:

"The Legislature used the words 'all' and 'of every kind whatsoever' in referring to business establishments covered by the Unruh Act (Civ. code, § 51, and the inclusion of these words, without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term 'business establishments' was used in the broadest sense reasonably possible. The word 'business' embraces everything about which one can be employed, and it is often

synonymous with 'calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain.' (See *Mansfield v. Hyde*, 112 Cal.App.2d 133, 137 [245 p.2d 577]; 5 Words and Phrases (perm. ed. 1940) p. 970 et seq.) The word 'establishment,' as broadly defined, includes not only a fixed location, such as the 'place where one is permanently fixed for residence or business,' but also a permanent 'commercial force or organization' or 'a permanent settled position (as in life or business.)' (See Webster's New Internat. Dict. (2d ed. 1957) p. 874; *id.* (3d ed. 1961) p. 778.)" (*Burks v. Poppy Construction Co.*, 57 Cal.2d at 468-469.)

See also *O'Connor v. Village Green Owners Assn.*, 33 Cal.3d at 795.

The "business establishment" language has also been construed to cover groups with "sufficient businesslike attributes" or a "businesslike purpose." (*O'Connor*, 33 Cal.3d at 796.) Factors such as number of persons employed, physical facilities maintained, fees charged, advertising solicited or sold, collection of royalties, and the performance of other "customary business functions" may identify an organization as a business establishment. (*Ibid.*; see also *Curran*, 147 Cal.App.3d at 730; *Pines v. Tomson*, 160 Cal.App.3d at 386; and *Rotary Club*, 178 Cal.App.3d at 1051-1055.)

The coverage of private nonprofit organizations with businesslike attributes has been held to be "[c]onsistent with the Legislature's intent to use the term 'business establishments' in the broadest sense reasonably possible (*Burks v. Poppy Construction Co.*, *supra*, 57 Cal.2d at p. 468), . . ." (*O'Connor*, 33 Cal.3d at 796.) Broadly defined, the term "business" includes both commercial operations

and noncommercial entities which are public accommodations or affected with a public interest or which have businesslike attributes. (*Pines v. Tomson*, 160 Cal.App.3d at 385-386; and *Curran*, 147 Cal.App.3d at 728.)

These two branches of noncommercial coverage—for enterprises with “sufficient businesslike attributes” or enterprises “affected with a public interest”—give definition to the phrase “all business establishments of every kind whatsoever,” as applied to nonprofit organizations. Court decisions therefore defeat appellants’ claim that Unruh is unconstitutionally vague.

**B. California Courts Have Construed Unruh So As To Avoid Its Application To Constitutionally Protected Conduct.**

Appellants also allege that Unruh is unconstitutionally overbroad and might place impermissible restrictions on activities protected under the First Amendment, but California courts have limited Unruh’s application so as to safeguard conduct worthy of First Amendment protection. No basis exists to invalidate the state statute as substantially overbroad.

The First Amendment overbreadth doctrine is an exception to the “traditional rule” that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. (*New York v. Ferber*, 458 U.S. 747, 767 (1982).) See also *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). This exception exists because of the chilling effect statutes susceptible to unconstitutional application

may have upon activity constitutionally protected by the First Amendment. (*New York v. Ferber*, 458 U.S. at 768-769.)

Because the overbreadth doctrine is contrary to the usual rule that federal courts will not litigate hypothetical cases (*New York v. Ferber*, 458 U.S. at 768), the doctrine has been described as "strong medicine" (*Broadrick*, 413 U.S. at 613; *New York v. Ferber*, 458 U.S. at 769), and the statute's overbreadth must be substantial before invalidation is justified. This is particularly true where, as here, the government is seeking to control conduct reflecting legitimate state interests, not to interfere with protected First Amendment activity. As explained in *Broadrick*, 413 U.S. at 615:

"[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

Furthermore, as with the void-for-vagueness doctrine, a statute will not be declared unconstitutionally overbroad if the law has been construed so as to avoid unconstitutional applications.

"If the invalid reach of the law is cured, there is no longer reason for proscribing the statute's application to unprotected conduct." (*New York v. Ferber*, 458 U.S. at 769 n.24.)

The overbreadth doctrine thus serves "a valuable institutional purpose: It allows state courts the opportunity to construe a law to avoid constitutional infirmities." (*Id.*, at 768.)



California courts have construed Unruh to avoid infringement of constitutionally protected rights. In *Pines v. Tomson*, where Unruh was applied to the commercial activities of the publishers of a business directory, the Court ruled that Unruh prohibited a "born-again Christian" requirement for advertisers, and yet upheld the publisher's claim that Unruh could not constitutionally be applied to regulate discriminatory statements of editorial opinion. As the Court stated:

"[A]ppellants' views, as opposed to its discriminatory practices, are entitled to protection under the free speech guarantees of the California and United States Constitutions." (*Pines v. Tomson*, 160 Cal. App.3d at 393.) (Footnote omitted.)

The Court carefully distinguished between secular, commercial activities and constitutionally protected rights of expression. (*Id.*, at 388-395.) Similarly, in *James v. Mar- inship Corp.*, 25 Cal.2d at 736, the California Supreme Court noted that the statutory predecessor to Unruh did not prevent unions from excluding persons with "interests inimical to the union . . . ."

California decisions have also carefully defined the reach of Unruh so as to exclude coverage of strictly private associations constitutionally protected under the right of intimate association described in *Jaycees*. For example, in *Isbister*, 40 Cal.3d at 84 n.14, the Court stated:

"[T]he statute does not govern relationships that are truly private—to paraphrase Horowitz' words, those which are 'continuous, personal, and social' (33 So.Cal.L.Rev. at p.281) and take place more or less outside 'public view.' (*Id.*, at pp. 287, 289)."



Similarly, in *Curran*, 147 Cal.App.2d at 731, the court recognized that “*strictly private clubs*” are constitutionally protected, adopting the same analysis as developed under Title II of the Civil Rights Act of 1964, 42 United States Code sections 2000a *et seq.*, to evaluate whether the Constitution restricted application of Unruh. As explained therein:

“Since the essence of a private club or organization is exclusivity in the choice of associates, we find this approach ensures that private organizations remain protected. However, those entities which are not in fact private must comply with the mandate of the Unruh Act.” (*Ibid.*)

The same limitations as to the reach of Unruh were expressed in the decision under review herein. As stated in *Rotary Club*, 178 Cal.App.3d at 1059:

“While there is personal and social interaction among Rotarians, the commercial aspects of the relationship clearly preclude a conclusion that they are ‘truly private.’ ”

Appellants’ claim of substantial overbreadth is further weakened by Unruh’s focus on regulating conduct, not expression. Arbitrary discrimination may not be used to deny entitlement to full and equal “accommodations, advantages, facilities, privileges, or services.” These words demonstrate Unruh’s concern with regulating conduct towards other persons, as opposed to speech itself.

As a final matter, facial invalidation on the ground of overbreadth is not appropriate where, as here, the statute unquestionably may be constitutionally applied to a wide range of situations. See *Parker v. Levy*, 417 U.S. 733, 760 (1974). Appellants cannot and do not deny that there

are "a substantial number of situations to which [the statute] might be validly applied." (*Ibid.*)

Given the language of Unruh, and the careful attention California courts have paid to safeguarding constitutionally protected rights, appellants' mere speculation that Unruh might deter persons from engaging in constitutionally protected activities does not justify invalidation of the entire statute as overbroad.

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### CONCLUSION

For the foregoing reasons, the decision below should be either summarily affirmed for lack of jurisdiction or affirmed as properly applying constitutional standards. The Court of Appeal correctly construed and applied Unruh within constitutional limits, and no basis exists to set aside the decision below.

Respectfully submitted,

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